

1. CIR (DIST/DRY CODE)

1. CIR/DIST/ DIV CODE		2. PERSON REPRESENTED		VOUCHER NUMBER 040126000018			
3. MAG. DKT/DEE NUMBER		4. DIST DKT/DEE NUMBER		5. APPEALS DKT/DEE NUMBER			
7. IN CASE/MATTER OF (Case Name) Drake vs. Portuondo		8. PAYMENT CATEGORY <input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Other Writ of Habeas Corpus		9. TYPE PERSON REPRESENTED <input type="checkbox"/> Adult Defendant <input type="checkbox"/> Juvenile Defendant <input type="checkbox"/> Appellant <input type="checkbox"/> Appellee <input type="checkbox"/> Other:			
11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) n/a in civil matters		10. REPRESENTATION TYPE (See Instructions) Writ of Habeas Corpus					
12. PROCEEDING IN WHICH TRANSCRIPT IS TO BE USED (Describe briefly) Deposition in preparation for hearing on habeas corpus petition.							
13. PROCEEDING TO BE TRANSCRIBED (Describe specifically). NOTE: The trial transcripts are not to include prosecution opening statement, defense opening statement, prosecution argument, defense argument, prosecution rebuttal, voir dire or jury instructions, unless specifically authorized by the Court (see Item 14). Testimony of Hon. Peter Broderick taken on Nov. 26, 2003							
14. SPECIAL AUTHORIZATIONS							
A. Apportioned Cost _____ % of transcript with (Give case name and defendant)					JUDGE'S INITIALS X		
B. <input type="checkbox"/> Expedited <input type="checkbox"/> Daily <input type="checkbox"/> Hourly Transcript <input type="checkbox"/> Realtime Unedited Transcript							
C. <input type="checkbox"/> Prosecution Opening Statement <input type="checkbox"/> Prosecution Argument <input type="checkbox"/> Prosecution Rebuttal <input type="checkbox"/> Defense Opening Statement <input type="checkbox"/> Defense Argument <input type="checkbox"/> Voir Dire <input type="checkbox"/> Jury Instructions							
D. In this multi-defendant case, commercial duplication of transcripts will impede the delivery of accelerated transcript services to persons proceeding under the Criminal Justice Act.							
15. ATTORNEY'S STATEMENT As the attorney for the person represented who is named above, I hereby affirm that the transcript requested is necessary for adequate representation. I, therefore, request authorization to obtain the transcript services at the expense of the United States pursuant to the Criminal Justice Act. Signature of Attorney: David Gerald Joy Printed Name: David Gerald Joy Telephone Number: (716) 856-6300 <input checked="" type="checkbox"/> Panel Attorney <input type="checkbox"/> Retained Attorney <input type="checkbox"/> Pro-Se <input type="checkbox"/> Legal Organization Date: 12-2-03			16. COURT ORDER Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 15 is hereby granted. John T. Ely, S.U.S.D.J. Signature of Presiding Judicial Officer or By Order of the Court December 3, 2003 Date of Order Nunc Pro Tunc Date				
17. COURT REPORTER/TRANSCRIBER STATUS <input type="checkbox"/> Official <input type="checkbox"/> Contract <input type="checkbox"/> Transcriber <input checked="" type="checkbox"/> Other			18. PAYEE'S NAME (First Name, M.I., Last Name, including any suffix), AND MAILING ADDRESS DeLoe Crosby Reporting Sv. 197 Delaware Ave Buff NY 14212 Telephone Number: 716-853-5544				
19. SOCIAL SECURITY NUMBER OR EMPLOYER ID NUMBER OF PAYEE							
20. TRANSCRIPT		INCLUDE PAGE NUMBERS	NO. OF PAGES	RATE PER PAGE	SUB-TOTAL	LESS AMOUNT APPORTIONED	TOTAL
Original							
Copy		55		3.00			165.00
Expenses (Itemize)		postage 60 miles @ .32					19.20
TOTAL AMOUNT CLAIMED:							184.20
21. CLAIMANT'S CERTIFICATION OF SERVICE PROVIDED I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment (compensation or anything of value) from any other source for these services. Signature of Claimant/Payee: Martha G Hendinger Date: 1/5/04							
22. CERTIFICATION OF ATTORNEY OR CLERK I hereby certify that the services were rendered and that the transcript was received. Signature of Attorney or Clerk: [Signature] Date: 1/7/04							
23. APPROVED FOR PAYMENT John T. Ely, SUSDS Signature of Judicial Officer or Clerk of Court January 23, 2004 Date							
24. AMOUNT APPROVED						\$189.20	

UNITED STATES DISTRICT COURT

Robie J. Drake,

Petitioner,

Motion for Summary
Judgment

v.

99-CV-0681E

L.A. Portuondo,

Respondent.

This memorandum is filed in support of the Respondent's motion for summary judgment in the above captioned habeas corpus proceeding.

Statement Of Facts

On the night of December 5-6, 1981, teenagers Amy Smith and Stephen Rosenthal were in Rosenthal's 1969 Chevy Nova in the parking lot of a factory in the City of North Tonawanda, New York. The factory parking lot was adjacent to a junkyard with abandoned vehicles. It is undisputed that Petitioner Robie Drake, herein referred to as the defendant, shot Smith and Rosenthal a combined 19 times, to death, shortly after midnight. (Trial transcript at 482-95).

The only issue at trial was whether Drake had the requisite intent for second-degree murder. Drake's theory of defense was that he did not know the two victims were in the car.

At trial, the prosecution called Mr. Richard Walter to testify about a syndrome known as "picquerism," where one commits violent acts as a means of effectuating a perverted sexual urge. Upon hearing all of the evidence, a jury found Drake guilty of second-degree murder. Drake is incarcerated, having received two consecutive terms of 20 years to life.

After years of unsuccessful appeals, Drake alleges that Walter may have committed perjury during his testimony in regards to his credentials and qualifications.

Procedural History

A judgment was entered against the defendant in Niagara County Court on December 1, 1982, convicting the defendant, after a jury trial, of two counts of Murder in the Second Degree [N.Y.P.L. § 125.25 (1)]("intent to cause the death of another person"). In connection with these convictions, the defendant was sentenced to two consecutive indeterminate terms of imprisonment of twenty (20) years to life (DiFlorio, J.). The defendant appealed his conviction to the Fourth Department of the Appellate Division of the New York State Supreme Court. On April 3, 1987, the Appellate Division affirmed the conviction. *People v. Drake*, 129 N.Y.A.D.2d 963 (4th Dept. 1987). Leave to appeal to the New York State Court of Appeals was denied on March 3, 1987. *People v. Drake*, 71 N.Y.2d 895 (1987). The defendant subsequently brought a writ of error coram nobis before the Appellate Division on the basis of the ineffective assistance of appellate counsel. The defendant was denied coram nobis relief on June 9, 1995. *People v. Drake*, 216 N.Y.A.D.2d 968 (4th Dept. 1995). A motion for reargument was subsequently denied on September 29, 1995.

The defendant then brought a motion to vacate the instant judgment pursuant to N.Y.C.P.L. Section 440.10 on the basis of newly discovered evidence. The newly discovered evidence presented by the motion was that the testimony offered by the State's psychological expert, Richard D. Walter, was false and known to be false by the prosecution and, further, that the prosecution

had withheld from the defense at the time of trial a police report which contained exculpatory material. On August 1, 1996, the Niagara County Court denied the defendant's motion without a hearing (Fricano, J.) The summary denial was reviewed by the Appellate Division, Fourth Department, and affirmed on December 31, 1998. *People v. Drake*, 256 N.Y.A.D.2d 1159 (4th Dept. 1998). Leave to appeal to the Court of Appeals was denied on June 25, 1999. *People v. Drake*, 93 N.Y.2d 969 (1999).

A petition dated September 13, 1999, was filed with the District Court on September 21, 1999. In that petition, the defendant presented several grounds for relief including the issues briefed herein. The District Court denied the defendant's habeas corpus relief, ruling that the any possible perjury did not affect the verdict. The defendant appealed the denial of relief to the Second Circuit Court of Appeals. The Court of Appeals granted the defendant a certificate of appealability on December 17, 2001.

In its decision dated January 31, 2003, the Court of Appeals "held that: (1) the trial court's refusal to grant petitioner's request for continuance was not an unreasonable application of federal law, and (2) remand to the district court was required to determine whether the prosecution knew or should have known of its psychological expert's perjured testimony." *Drake v. Portuondo*, 321 F.3d 338 (2003).

Thus, the issues to be resolved by this Court are whether the expert, Mr. Walter, committed perjury at the original trial, whether the prosecution knew, or should have known about the perjury, and whether the perjury was harmless error.

Summary Judgment Standard

The standard for summary judgment is well-established. FRCvP 56(c) requires that a motion for summary judgment be denied unless the court determines, after reviewing all the evidence presented, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 585-588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The party seeking a summary judgment must demonstrate the absence of a genuine issue respecting any material fact. *Celotex*, at 325. A genuine issue of fact requires such evidence that a reasonable jury could thereupon return a verdict for the non-moving party and, when determining if a genuine factual issue exists, the court must consider the substantive evidentiary burdens assigned to each party. *Anderson*, 248, 254. All reasonable inferences must be drawn and all ambiguities must be resolved favorably to the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir.1995). However, the non-moving party may not rest upon unsubstantiated allegations, conclusory assertions or mere denials of the adverse party's pleading, but must set forth and establish specific facts showing that there is a genuine issue for trial. FRCvP 56(e).

Summary judgment must be granted against a party in instances when he fails to adequately establish an essential element on which he bears the burden

of proof. *Celotex*, at 322. A metaphysical or other whimsical doubt concerning a material fact does not establish a genuine issue necessitating a trial. *Matsushita Elec. Industrial Co.*, at 586. The "mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. *Anderson*, at 252." *Lockwood v. Coughlin*, 1997 WL65888 (W.D.N.Y. 1997).

Standard For Limited Review In Habeas Corpus Cases

In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Supreme Court addressed the grounds for a writ as established by the 1996 Antiterrorism and Effective Death Penalty Act (the AEDPA) in habeas corpus cases that deal with claims adjudicated on the merits in state court. According to the Court:

"the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, at 362

Under both the "contrary to" and "unreasonable application" standards, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the state court reached the wrong

conclusion. Rather, the court's "inquiry should ask whether the state court's application of clearly established law was objectively unreasonable." *Williams v. Taylor*. "Thus, a federal habeas court is not empowered to grant the writ when, in its independent judgment, it determines that the state court incorrectly applied the relevant federal law. The state court's application must reflect some additional increment of incorrectness such that it may be said to be unreasonable." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000). Additionally, the AEDPA requires that "a determination of a factual issue made by a State court shall be presumed to be correct" and the Petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(i).

In the case at hand, the above standards for summary judgment and habeas corpus review are to be applied to three main issues: whether Mr. Walter committed perjury, whether the prosecution knew or should have known about the perjury, and whether the perjury prejudiced the defendant.

A. Mr. Walter Did Not Commit Perjury

"In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. §§ 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See §§ 1621(1); *United States v. Debrow*, 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed. 92 (1953); *United States v. Norris*, 300 U.S. 564, 574, 576, 57 S.Ct. 535, 539, 540, 81 L.Ed. 808 (1937). This

federal definition of perjury by a witness has remained unchanged in its material respects for over a century. See *United States v. Smull*, 236 U.S. 405, 408, and n. 1, 35 S.Ct. 349, and n. 1, 59 L.Ed. 641 (1915).” *U.S. v. Dunnigan*, 113 S.Ct. 1111, 1116 (S.Ct. 1993).

As explained below, there was no perjury in defendant’s trial. There is no evidence that Mr. Walter intentionally gave any false testimony during the trial. At most, Mr. Walter’s statements may have been confusing or mistaken. However, in all cases, his statements were factually based.

1. Mr. Walter’s Statements Regarding His Experiences At The Los Angeles County Coroner’s Office Were Truthful

Walter testified that, during his time as a **student professional worker** at the Los Angeles County Coroner’s Office, approximately 40,000 cases came through the office (Trial Testimony 789). Mr. Walter then testified to his involvement in those cases:

“District Attorney Broderick: How many of those cases did you have anything to do with yourself?

Mr. Walter: Between 7,500 to 10,000.

Broderick: When you say that you didn’t handle those cases yourself, did you?

Walter: No. I had **personal involvement** with at least five thousand seventy-five hundred of **some capacity** in terms of investigation. (Emphasis added).

Broderick: And that would be advisory?

Walter: Right.

Broderick: How many of those cases could you estimate for us in just a ballpark figure would be homicide, that is, murder or manslaughter cases?

Walter: The best estimate would be about five thousand.

Broderick: And again what—what information were you given in connection with making the determinations that you made in the preparation of these profiles?

Walter: Well, you not only had the police report in terms of what they found at the scene. You also had the crime photos, and then you also had the deceased and the body and the

autopsy findings that were coming forth. So you had some basis to make some opinion on.

Broderick: Did you have access to lab results?

Walter: Right.

Broderick: Witness's statements?

Walter: Right.

Broderick: Did you have an opportunity to view the actual victim of the homicide?

Walter: Yes.

Broderick: Study their wounds, injuries?

Walter: Yes.

Broderick: Consult with pathologists?

Walter: Right.

Broderick: In conjunction therewith did you have an opportunity to review other evidence collected in these cases?

Walter: Yes.

Broderick: And as I understand it, then you would prepare the profile?

Walter: Right." (T. 789-791)

When Walter was questioned under oath, pursuant to the Second Circuit court-ordered discovery proceedings, about these previous in-court statements, Mr. Walter affirmed that during his time at the L.A. County Coroner's office, he crossed paths with 5,000 to 7,500 cases (Walter Deposition on July 30, 2003, p.90). Mr. Walter went on to say that while he did have low level responsibilities such as cleaning glass tubes and filling bottles, he would constantly be looking at cases and inquiring with detectives to learn as much as possible (Walter Dep., p. 94-95). All the information that came into the Coroner's Office, police investigation, toxicology and pathologist reports went through Walter's hands. Lots of times, Mr. Walter would give his opinion to police officers or pathologists, at their request, about criminological, psychological or forensic matters on cases, although he never produced any written reports (Walter Dep., p. 95-96, 117). When the defendant's attorney asked Walter to giving an example, Walter readily recounted a case where a sexual assault/murder victim had burn marks on her

hands. The pathologist who was working on the case asked Walter for his opinion and Walter told the pathologist that he thought the burn marks came from the victim holding onto bare wires connected to a generator. Subsequent investigation proved Walter correct. (Walter dep., p. 96)

The defendant contends that a June 11, 1993 statement from Dr. Griesemer is proof of Walter's perjury. Dr. Griesemer was Mr. Walter's supervisor during his time at the Los Angeles County Coroner's office. Dr. Griesemer, in a written statement **prepared by the defendant** (in which Griesemer's name was spelled wrong), said that Mr. Walter "did laboratory support: He control (sic) the identification and storage of specimens. Prepared containers with labels and powders. Cleaned glassware and stored supplies." (Griesemer June 11, 1993 Statement, p.2). Dr. Griesemer also stated that Mr. Walter did not perform any psychodynamic analysis or crime scenes or suspects, nor perform any work psychological in nature while at that office. *Id.* at 3.

A much more detailed account by Dr. Griesemer, prepared by Griesemer himself on October 16, 1995,, presents a complete picture of Walter's duties at the Coroner's Office. According to Dr. Griesemer, Walter:

would read through as many of these reports and review items as he could and he was continually discussing cases with Coroner's staff members and similarly interested people from outside such as police officers, detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances in individual causes of death for specific Coroner's cases. Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Corner. He also attended the scientific departmental discussions in meetings of both the Toxicology Section and Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-

one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department.

A copy of Dr. Griesemer's October 16, 1995, letter is attached hereto as exhibit A.

Dr. Griesemer's statement shows that Walter was part of the support staff at the Coroner's office. While Walter was not someone who would have a great deal of structured input in the cases that came into that office, the purpose of him being there as a student intern was to become acquainted with the manner in which those investigations progressed, and to familiarize himself about that line of work when the opportunity was present. It is clear that Walter was at the Coroner's office in a learning capacity and he made that clear in his testimony at the defendant's trial.

It is also important to take into consideration what Mr. Walter did *not* say. At no point in his trial testimony did Mr. Walter state that he was the one writing any reports for the Coroner's office, that he was leading any investigations, that he was testifying before the grand jury, or that he was testifying before a petit jury. Instead, the testimony at the defendant's trial shows that Mr. Walter's time at the Coroner's office was not spent as a supervisor or as a lead case officer, rather he "was a *student* professional worker at the time, while [he] was taking an academic course work in criminal justice." (Trial transcript at 788).

On cross-examination during the trial, the defense counsel never bothered to inquire further into the subject of Mr. Walter's experience with the Coroner's office. The defense never developed what Mr. Walter meant when he said he

had “participated” in 7,500 cases while with the Coroner’s office, nor did the defense develop what Walter meant when he said he had an “advisory” role. Further, the defense never asked Walter if he testified in court for the Coroner’s office about profiling or if he had written any reports. This is a subject that the defense had an opportunity to explore and develop during cross-examination; it was not the prosecutor’s job.

As it stands, however, Mr. Walter’s original in-court statements were, in fact, truthful as to what he did and to what his role was while employed with the L.A. County Coroner’s office.¹

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The American Academy of Forensic Sciences, Ethics Committee, investigated the complaint from the defendant concerning Walter’s testimony. The Committee determined that there was no violation of the Academy’s *Code of Ethics and Conduct*. A copy of the Committee’s decision is attached hereto as exhibit B.

2. Mr. Walter Did Lecture At Northern Michigan University

The next issue regarding Mr. Walter's qualifications is his testimony at trial that he was an adjunct lecturer at Northern Michigan University. At the original trial, Mr. Walter did state that he was an "adjunct *lecturer* at Northern Michigan University." (Trial transcript at 784) In his later deposition on July 30, 2003, he stated that he lectured at Northern Michigan University as a guest of a professor (Walter Dep., p.75), thus he could be considered an adjunct lecturer (Walter Dep., p. 73). In fact, Mr. Walter testified that the professor for whom he was lecturing referred to him as an adjunct lecturer (Walter Dep., p.73), and Mr. Walter produced a letter from that professor, who states that Walter was an adjunct in his course (Walter Dep., p.68, deposition exhibit 29). Additionally, at no point in his trial testimony did he state that he was a professor, nor that he was employed by the University.

3. Mr. Walter Was A Limited Psychologist At The Michigan Department Of Corrections And He Never Stated Otherwise

The next issue regarding Mr. Walter's qualifications is whether he wrongfully represented himself at trial as a psychologist while he was employed at the Michigan Department of Corrections. According to his licensing, Mr. Walter was a "limited psychologist" and, according to the relevant Michigan Law, the limitations on that license "shall prohibit advertising or other representation to the public which will lead the public to believe the individual is engaging in the practice of psychology." Michigan Comp. Laws Ann. § 333.18223(2). However, at no point did Mr. Walter state that he was a psychologist. Rather, when asked his profession, Walter responded that he was a "prison psychologist" (Trial transcript at 783), an answer that was correct, since at the time he was employed

at a Michigan prison as a limited psychologist, and was licensed as a limited psychologist (Michigan Board of Psychology License). Further, at the original trial on cross-examination, Mr. Walter made it clear that he had earned only a Masters Degree, and not a Ph.D. in psychology:

“Mr. Perry: Mr. Walter, did you say you had a Masters Degree?

Mr. Walter: Yes

Perry: Ph.D. in psychology. Is there one or do you have one, do you have one?

Walter: No, I do not.” (Trial transcript at 805)

It is clear from this testimony that Mr. Walter did not present himself as being in a position with the Michigan Department of Corrections that was incorrect in any way.

4. Mr. Walter Truly Believed He Had Testified Previously As An Expert

Finally, there is a question as to whether Mr. Walter wrongfully represented himself by misstating his previous expert testimony. At the original trial, Mr. Walter offered that he had previously testified as an expert in Los Angeles County and in Pasadena:

“Broderick: Have you ever been qualified to testify as an expert witness in any criminal court?

Walter: Yes

Broderick: And what states and jurisdictions, if you would, please.

Walter: In California, Los Angeles County and in Pasadena.” (Trial transcript at 785),

According to the later deposition, there is a discrepancy as to whether Mr. Walter stated that he was qualified in two locations, Los Angeles County *and* in Pasadena, or whether it was one location, Los Angeles County in Pasadena (Walter Dep., p.85). As Pasadena is a locality within Los Angeles County, it is

possible to be qualified as an expert in Pasadena and in Los Angeles County in one instance.

Also, it now appears that Mr. Walter was never actually qualified as an expert back in Los Angeles County. Instead, the testimony Mr. Walter gave was regarding the chain of evidence procedures within the Coroner's office:

“Mr. Jay: Where had you been qualified to testify as an expert witness in a Criminal Court in 1982 before October 17th – or 22nd, pardon me?

Mr. Walter: That's what we were talking about earlier. I said in Pasadena, not as an expert in psychology. It was the expert on the chain of evidence on that particular case.

Mr. Jay: But, sir, when a chain of evidence person testifies, they're not testifying as an expert, are they?

Mr. Walter: I believe they were.

Mr. Jay: You believe they are?

Mr. Walter: Yeah.” (Walter Dep., p.84-85)

While Mr. Walter believed that he was testifying as an expert, that he had scientific expertise and knowledge beyond that of a layperson, he was incorrect in interpreting that this was a situation in which he could be deemed an expert by the Court. Mr. Walter made no attempt to deceive or mislead the Court in that instance.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court stated, “The subject of an expert's testimony must be “scientific ... knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science....The term ‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’” 509 U.S. 579, 589, 113 S.Ct. 2786 (1993). While Mr. Walter testified to the scientific procedures used by the Coroner's office, he did not testify to anything that should be seen as an immutable truth or a scientific fact. Mr. Walter may have seen

himself as a scientist, but he did not realize that what he was testifying to did not constitute expert testimony.

In this circumstance, we clearly have a case of confusion rather than one of willful intent to mislead. As Mr. Walter thought he had been qualified as an expert within each of those geographic regions, he therefore believed the testimony he gave was factual.

It is easy to misunderstand exactly what Walter said when he originally testified at trial. Even the Second Circuit Court of Appeals got the facts regarding Walter's testimony incorrect in their decision. The Court stated that Walter claimed that he had "an adjunct professorship at Northern Michigan University;...and expert testimony given at hundreds of criminal trials in Los Angeles and Michigan." *Drake v. Portuondo*, 321 F.3d 338 at 342 (2d Cir. 2003). Unmistakably, nowhere in his testimony did Walter state that he was an adjunct *professor* at Northern Michigan, and at no point did Walter mention that he had previously testified at *hundreds* of trials. If the Second Circuit is getting some of the facts wrong, then part of the testimony is easily misconstrued. However, this does not imply that Walter was perjuring himself on the stand, and upon a closer inspection of the testimony, the evidence shows that perjury did not occur.

5. Walter Did Not Invent the Diagnosis of Picquerism

Contrary to the defendant's assertions, Walter did not invent the diagnosis of picquerism. Although the term does not appear in the DSM manuals, the term appears in numerous, serious, criminal investigative works, including:

V. Geberth, Practical Homicide Investigation, Tactics, Procedures and Forensic Techniques, 470, 765-6 (3rd ed. 1996).

Arrigo and Purcell, *Explaining Paraphilias and Lust Murder: Toward and Integrated Model*, 45 International Journal of Offender Therapy and Comparative Criminology 1 (2001).

R. Morneau and R. Rockwell, Sex, Motivation and the Criminal Offender, 146-153 (1980).

J. DeRiver, Crime and the Sexual Psychopath, 46-9 (1958).

**B. Even If Mr. Walter's Testimony Was Perjurious,
The Prosecution Did Not Know, Nor Should the
Prosecution Have Known, That The Statements Were False.**

Not only did the prosecution not know that Walter's testimony might have been perjurious, there was no reason for the prosecution to have known that the testimony was anything but truthful.

**1. The Prosecution Did Not Know Of Any Possible
Perjury By Mr. Walter**

There is no evidence indicating that the prosecution, at any time, knew that Mr. Walter may have committed perjury. At no time did Walter indicate to the prosecutor, now Honorable Peter E. Broderick, that he was not telling the truth. Prior to heading into court, while questioning Mr. Walter about his qualifications, the prosecutor discovered and was impressed by the fact that Walter was a member of the American Academy of Forensic Sciences. (Nov. 26, 2003, Broderick, pp. 28-9). Once in court and under oath, the prosecutor questioned Mr. Walter about his educational background and his prior testimony as an expert. Mr. Walter responded to these inquiries by stating his degrees (Trial transcript at 783), and that he had been qualified as an expert in court before. (Trial transcript at 785).

The prosecutor stated that he did not go into great detail about an expert's education and experience prior to the in-court testimony because that expert would be testifying under oath anyway and be subject to perjury charges. (Nov. 26, 2003, Broderick, p.52). When it came to questioning experts about their credentials, the prosecutor testified that this was something that he never did for his own experts, so here he followed his normal procedure and did not call anyone to check on Walter's credentials. *Id.* at 31. Because Walter did not tell the prosecutor that Walter was lying and because the prosecutor did not learn from any outside sources that Walter was lying, the defendant has failed to prove that the prosecutor knew that Walter was committing perjury.

The defense argues that an inference can be made regarding the prosecution's knowledge of Mr. Walter's possible perjury because Mr. Walter was called at the last minute with little notice to the defense and because there was no written report provided ahead of time. As explained below, neither of these inferences are supported by the facts in the case.

Mr. Walter's testimony was not deemed necessary by the prosecution until shortly before the trial, and in fact, the prosecution did not even know of Mr. Walter until just before the trial. An initial report prepared by a pathologist at the Erie County Medical Examiner's Office indicated the presence of sperm in the female victim's rectum. The prosecutor was relying upon the presence of sperm in the rectum to provide a motive and evidence of intent. As the prosecutor put it "at that point in time I had no need for anybody to explain this case. I had the explanation because I had a slide that said there was sperm in her rectum." (Nov. 6, 2003, Broderick p. 48).

Several weeks before trial started on October 19th, perhaps during September, the defense made a supplemental motion to inspect the slides which contained the material taken from the female victim's rectum. The prosecutor contacted Dr. Uku at the Medical Examiner's Office in Erie County to obtain the slides. Dr. Uku indicated that he did not know where the slides were and that the pathologist who had been working on them had been let go. The next day, Dr. Uku called the prosecutor and told him that he had found the slides but that the slides did not contain any sperm. The prosecutor then called the defendant's trial attorneys to inform them. (Aug. 21, 2003, Broderick, p. 36; Nov. 26, 2003, Broderick, p. 50).

Shortly thereafter, perhaps around of the first of October, the prosecutor talked with Dr. Levine, a forensic odontologist who had previously testified in a sensational case in Erie County. (Nov. 26, 2003, Broderick, pp. 41, 45, 49). Dr. Levine was scheduled to testify in the defendant's case about the bite marks on the female victim's breast. The prosecutor told Dr. Levine that he had lost the rectal sperm evidence and Dr. Levine told him that he should talk with Walter. (Aug. 21, 2003, Broderick, p. 38). Dr. Levine told the prosecutor that Walter, like Levine, was a member of the American Academy of Forensic Sciences and he worked in a Michigan state prison where his job was to debrief serious sex offenders, their families and the probation department in an effort to determine why they did what they did. (Aug. 21, 2003, Broderick, p. 38 – 39). The prosecutor contacted Walter, with the first contact on October 7th, just 12 days before opening statements on October 19th. *Id.*

Around October 1st, the prosecutor called Walter for the first time and gave him a thumbnail sketch of the case. Walter told the prosecutor that he would need some time to think about it. Sometime later that afternoon or the following morning, Walter called the prosecutor back and told the prosecutor that he thought picquerism was involved. The prosecutor had never heard of the term. Walter explained what picquerism meant and told the prosecutor that he had several books and he would send them. A couple of days later, the prosecutor received a green, hard-covered book, entitled *Sex, Motivation & the Criminal Offender* by Dr. Robert Morneau. Morneau's book had a chapter on picquerism. Walter also sent a second book which had some information on picquerism. (Aug. 21, 2003, Broderick, pp. is 43-47).

The night before Walter testified, the prosecutor picked Walter up at the airport. During the drive from the airport, Walter, based on his psychological insights, told the prosecutor facts about the case that the prosecutor had not disclosed to Walter. First, Walter told the prosecutor that oftentimes individuals who engage in this kind of conduct are so exhausted at the conclusion that they fall asleep. According to the prosecutor, when detective Giles transported the defendant to the police station from the scene of the crime, the defendant was asleep. (Nov. 26, 2003, Broderick, p. 28). Second, Walter told the prosecutor that people with picquerism often start out as Peeping Toms. According to the prosecutor, the defendant either had a charge or conviction for such an offense. *Id.* at 35. Third, Walter told the prosecutor that people with picquerism often subscribe to soldier of Fortune/commando type of magazines. According to the prosecutor, "the evidence in the case, which I didn't consider relevant at the time,

was that his room had a significant number of those types of magazines and that I had never related that fact to him and it wasn't important in my mind at the time and when he [Walter] said that to me it suddenly like hit me right between the eyes that here's a piece of the case that fit the profile." *Id.* at 36.

Walter's insights into the case gave the prosecutor confidence in Walter's ability, qualifications and expertise to testify at trial. According to the prosecutor, "it just convinced me that he was correct in his opinion." *Id.* at 38. It was at that point that the prosecutor decided that he could present Walter to the court. *Id.* at 31. After the drive from the airport, the prosecutor gave Walter the grand jury testimony and police reports. Walter testified the next day.

The above sequence of events explains why the prosecutor did not tell the defense about Walter before the trial and why there was no written report. The Court should note that under New York's Criminal Procedure Law, there is no requirement to produce a written report, only a requirement to provide a copy if a written report is produced. Finally, Niagara County Court, Hon. Amy J. Fricano, dismissed the defendant's CPL Article 440 proceeding ruling that the defendant failed to prove that the prosecutor knowingly allowed false testimony. Under AEDPA and the above chronology, Judge Fricano's ruling was not an unreasonable application of federal law.

2. The Prosecution Should Not Have Known of Any Possible Perjury by Walter

Not only did the prosecution not know of any perjury by Walter, there was no reason that the prosecution should have known of any perjury. First, Walter was recommended by Dr. Levine, a respected forensic odontologist, who had

previously testified in a high visibility case in Erie County and the prosecutor relied upon this referral when looking at Walter's qualifications. (Nov. 26, 2003, Broderick, pp. 41, 45, 49);(Aug. 21, 2003, Broderick, p. 38).

Second, as explained above, the prosecutor discussed the case with Walter to get a feel for him. Upon discussing this case with Mr. Walter, the prosecutor found that Mr. Walter was aware of facts that he would not have known without the understanding and insight of being a psychological expert. (Nov. 26, 2003, Broderick, pp. 28, 35-6.).

Third, Walter, like Levine, was a member of the American Academy of Forensic Sciences, an organization that the prosecutor had heard of. *Id.* at 29. Since Walter was a member of this respected national organization, it would naturally lead one to believe that he was a reputable source of information in his area of expertise.

Fourth, Walter supplied the prosecution with a book entitled *Sex, Motivation & the Criminal Offender* by Dr. Robert Morneau. This book, a copy of which was made available at the deposition of Walter, confirmed the specifics of the condition of picquerism, and supported Walter's testimony. The book was not "pulp fiction," but rather an academic work on psychological conditions. (Aug. 21, 2003, Broderick, pp. is 43-47; deposition exhibit, 17).

Fifth, the prosecution did not know, and should not have known, that Walter may have embellished the number of cases that he dealt with during his year at the L.A. County Coroner's office, as well as the detail in which he dealt with those cases. The prosecutor testified that he had not questioned this number with Walter during the trial because he had no idea what Walter's

caseload may have been at that office (Nov. 26, 2003, Broderick, pp. 38-9). The prosecutor had no basis for knowing what the caseload of the L.A. County Coroner's office would be in a given time period, nor would he have any idea of the normal duties and responsibilities of a given employee in that office. Also, the prosecutor should not have known that these numbers may have been an embellishment because it was facially possible for that many files to cross one's desk in the two and-a-half years that Walter spent at the Coroner's office, assuming that person looks at approximately 8-12 files per day.

Sixth, all of the above comported with the prosecutor's normal method of dealing with experts. The prosecutor had never previously telephoned or written an expert's employer to verify the expert's credentials, and he did not do so in this case. (Nov. 26, 2003, Broderick, pp. 32-5).

Seventh, no Supreme Court case has ever imposed an obligation on a prosecutor to contact an expert's employer to verify the expert's credentials. Habeas corpus petitions can be granted only if the state court's decision "was contrary to...clearly established Federal law, as determined by the Supreme Court of the United States,..." (see *Williams v. Taylor*, supra).

**C. Even If Walter Committed Perjury,
the Judgment Should Not Be Vacated**

As explained below, even if Walter committed perjury, there was overwhelming evidence of the defendant's guilt and this Court should not vacate his judgment of conviction.

1. Standard for Reversal

Beginning in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and continuing through *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976), the Supreme Court has held that “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” The Supreme Court and the Second Circuit have both applied this rule, *in dicta*, to cases where the prosecution should have known about perjury. *Id.*; see *Su v. Fillion*, 335 F.3d 119 (2d Cir. 2003). However, the Second Circuit has drawn a distinction between intentional and unintentional use of perjury. If a witness perjures himself, but the government is unaware of the perjury during trial, “a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.” *United States v. Moreno*, 181 F.3d 206, 213 (2d Cir.) (citations omitted), *cert. denied*, 528 U.S. 977, 120 S.Ct. 427, 145 L.Ed.2d 334 (1999). As explained below, even under the more stringent standard of intentional use of perjury, the Court should not vacate the judgment of conviction.

2. There Is No Reasonable Likelihood That the False Testimony Could Have Affected the Judgment of the Jury

Walter’s testimony went to motive and intent. However, Walter was not the only source of evidence that pointed to the defendant’s intent. The overwhelming volume of evidence indicates the intent of the defendant. As explained below, even without the testimony of Mr. Walter, there was an ample basis for the jury to conclude that the killings were intentional, rather than

accidental as the defendant claimed that he did not know there was anyone in the car.

There was testimony by a firearms examiner that, due to the gun powder residue recovered from the sweatshirt of one of the victim's sweatshirt, the defendant stood no more than eight (8) feet away from the victim's car while shooting, although a strong wind could have carried the gunpowder particles, and could make the shooter seem closer to the target than he actually was (Trial transcript at 569, 595, 598).

There was evidence that the defendant described the windows as "fogged up" to the police (Trial transcript at 278), a condition that only would have occurred if the vehicle were occupied.

There was testimony that the car in which the victim's were killed, although in poor condition, was clearly not abandoned due to the presence of the license plates and registrations sticker, which would have been visible due to the lighting in the dump (Trial transcript at 225).

There was evidence that the car was parked just off the road and not in an isolated area (Trial transcript at 289, 1024).

There was evidence that, despite the defendant's statement that he merely wanted to destroy the car (Trial transcript at 275), the only bullet holes in the car were in the passenger's side window (Trial transcript at 69, 268, 1027).

There was evidence that one of the victims suffered two bullet wounds to the head, and the other victim suffered 15 bullet wounds to the head, face and chest, and 2 stab wounds to the back of his body (Trial transcript at 482-495).

There was testimony that showed the defendant stabbed one of the victims after shooting him and hearing moans from the car he was in (Trial transcript at 700).

There was evidence showing that the defendant bit the left breast of one of the victims after shooting her (Trial transcript at 639, 656, 683).

There was evidence that the defendant may have known the victims from school (Trial transcript at 556, 624-626), and may have had a problem with one (Trial transcript at 557-559).

There was evidence that the defendant told a fellow prisoner that he had seen one of the victims while he was firing and that he meant to kill him when he stabbed him (Trial transcript at 723-724).

The cumulative weight of the above evidence would have been more than enough for a jury to find that the defendant intended to kill the victims when he began shooting at them.

Mr. Walter's testimony was offered to explain why the defendant committed these acts, a motive. He provided an explanation that the jury could have accepted or disregarded, yet still have come to the same guilty verdict because of the gravity of the volume of other evidence. Mr. Walter's testimony offered nothing that the jury needed to rely upon in order to come to the conclusion that the defendant knew the victims were in the car at the time he started shooting. The Supreme Court has stated that "Proof of motive is never indispensable to conviction for crime." *Pointer v. U. S.*, 151 U. S. 396, 14 S.Ct. 410 (1896). Thus, even without Mr. Walter's testimony, the jury could have found that the killings were intentional.

**3. The Defendant Failed to Use Due Diligence
to Discover the Perjury**

In *United States v. Helmsley*, 985 F.2d 1202, 1208 (2d Cir.1993), the Second Circuit held that, “at least for purposes of a collateral attack, a defendant is normally required to exercise due diligence in gathering and using information to rebut a lying prosecution witness.” The Second Circuit has made it clear that one way a defendant can rebut a lying prosecution witness is through effective cross-examination. Unlike the case in *Su v. Filon*, 335 F.3d 119 (2d Cir. 2003), where a lying prosecutor made effective cross-examination impossible, in defendant’s case, defendant’s trial counsel failed to ask any of the questions that his present counsel now asserts the prosecution should have asked its own witness. The defendant cannot have it both ways. He cannot fault the prosecution for not asking the same questions that he failed to ask.

Conclusion

Based on the above, the Respondent respectfully requests this Court to grant the Respondent’s motion for summary judgment.

Dated: September 24, 2004

Respectfully submitted,

BY: s/Thomas H. Brandt

THOMAS H. BRANDT
Assistant District Attorney
MATTHEW J. MURPHY, III
Niagara County District Attorney
Niagara County Courthouse
(716) 439-7085
Lockport, New York 14094
tombrandt1kpt@yahoo.com

TO: CLERK,
UNITED STATES DISTRICT COURT
David Jay, Esq.

Exhibit A

I HEREBY CERTIFY THIS TO
BE A TRUE AND CORRECT COPY

Ernest C. Griesemer

October 16, 1995

Don Harper Mills, M.D., J.D.
Chairman, Ethics Committee
American Academy of Forensic Sciences
911 Studebaker Road, Suite 250
Long Beach, CA 90815

RE: Richard Walter

Dear Dr. Mills:

Richard Walter worked in the Forensic Sciences Laboratories of the Department of Coroner, Los Angeles County, Los Angeles, California for two and a half years from 1/76 to 8/78. He was employed as a Student Professional Worker and worked with the Forensic Sciences, Toxicology and Histopathology Laboratories. He had a major responsibility for the chain of evidence control for all items submitted to the Laboratories and their storage. These items included, but were not limited to: blood samples, medical evidence including drugs, solutions, powders, heart pacemakers, blood purification equipment and other forensic evidence items such as stained clothing, household equipment suspected of containing residues; for example, eating paraphernalia. This list is only representative due to the limits of space. A comprehensive list would be exhaustively long.

Associated with the cases that involved these several items, all of which were accessible to Mr. Walter: Pathologist's evaluation reports concerning the circumstances and cause of death; also, Coroner's investigation reports, consulting physician reports, hospital reviews, police reports, and other related data and reviews directly related to individual death cases. All of these constituted extensive and often vast amounts of background information related to the death of an individual human being. While he was working here, I noted that Mr. Walter would read through as many of these report and review items as he could and he was continually discussing cases with Coroner's staff members and similarly interested people from outside such as police officers, detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death for specific Coroner's cases.

Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Coroner. He also attended the scientific departmental discussions in meetings of

Don Harper Mills, M.D., J.D.
RE: Richard Walter
October 16, 1995
Page # 2

both the Toxicology Section and Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department.

I know that Mr. Walter had extensive experience in mentally digesting background information of a very large number of Coroner's cases to which he was exposed while he was working here in the Coroner's Department of Los Angeles County, Los Angeles, California. In recent years, this county's case load was over 17,000 cases and he would have had direct understanding of the situation and cause of death in many of them.

Sincerely,

Ernest C. Griesemer

E. C. Griesemer, Ph.D.
1716 Edgecomb St.
Covina, CA 91724

I HEREBY CERTIFY THIS TO
BE A TRUE AND CORRECT COPY

Ernest C. Griesemer

STATE OF California)
COUNTY OF Orange) SS:

On this 13th day of Aug, 2004, before me a Notary Public, the undersigned office personally appeared E.C. GRIESEMER, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he is the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Taline Estrada
NOTARY PUBLIC

ADDRESS:

2781 W. MacArthur Blvd-B
Santa Ana, CA 92704

COMMISSION EXPIRES:

9-20-07



United States District Court
Western District of New York

Robie J. Drake,

Affidavit

Petitioner,

v.

L.A. Portuondo

Respondent.

State of California)
County of Orange) ss:

Ernest C. Griesemer, being duly sworn, deposes and says:

1. I am retired from my employment in the Los Angeles County Department of Coroner and make this affidavit in support of the respondent's motion for summary judgment.
2. Attached to this affidavit is a letter that I authored on October 16, 1995 in connection with the allegations that Richard Walter had testified untruthfully at the petitioner's criminal trial concerning his qualifications and work experience while he was working in the Los Angeles County Department of Coroner.
3. The letter was submitted to the American Academy of Sciences, which was investigating the allegations.
4. The letter was true and accurate on October 16, 1995, and it remains true and accurate as of today's date.

Ernest C. Griesemer
Ernest C. Griesemer, Ph.D.

Sworn to before me
the 28th day of Aug., 2004
Notary Public

Taline Estrada

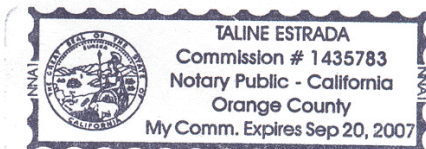


Exhibit B



AMERICAN ACADEMY OF FORENSIC SCIENCES

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Colorado Springs, CO

**CONFIDENTIAL
MEMORANDUM**

February 2, 1996

Mrs. Marlene V. Drake
19 East Park MHC
Hyde Park, N Y 12538

RE: Richard D. Walter

Dear Mrs. Drake:

The Committee has reviewed your complaints and transcripts and has sought additional comments from Michigan and California. Most of the issues do not involve the Academy's Code of Ethics. Though Mr. Walter's representation of status in Michigan and of experiences in California do fall within the purview of the Code, the Committee has concluded unanimously that there was no material misrepresentation and therefore no Code violation.

Very truly yours,

Don Harper Mills, M.D., J.D.
Chairman, Ethics Committee

DHM/sdh

Street Address:
410 North 21st Street • Suite 203
Colorado Springs, CO 80904-2798

Federal I.D. Number 87-0287045

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329

Petitioner,

vs.

99-CV-0681E(Sr)

L.A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility

Respondent.

Certificate of Service

I hereby certify that on September 24, 2004, I electronically filed the foregoing Motion for Summary Judgment with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

None

And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

DAVID GERALD JAY, ESQ.
120 Delaware Avenue, Suite 200
Buffalo, New York 14202

/s/ Thomas H. Brandt
District Attorney's Office
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094
(716-439-7085)
E-Mail: Tom.brandt@niagaracounty.com

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329

Petitioner

vs.

NOTICE OF MOTION

L. A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility

99-CV-0681E(Sr)

Respondent

MOTION BY:

THOMAS H. BRANDT,
Niagara County District Attorney

DATE, TIME and PLACE
OF MOTION:

October _____, 2004
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
68 Court Street
Buffalo, New York 14202

SUPPORTING PAPERS:

Memorandum of Thomas H. Brandt

RELIEF DEMANDED:

Motion for Summary Judgment

DATED: September 28, 2004

TO: RODNEY EARLY, CLERK
U.S. District Court
For the Western District of New York

David Gerald Jay, Esq.
Attorney for Petitioner

UNITED STATES DISTRICT COURT

Robie J. Drake,

Petitioner,

Motion for Summary
Judgment

v.

99-CV-0681E

L.A. Portuondo,

Respondent.

This memorandum is filed in support of the Respondent's motion for summary judgment in the above captioned habeas corpus proceeding.

Statement Of Facts

On the night of December 5-6, 1981, teenagers Amy Smith and Stephen Rosenthal were in Rosenthal's 1969 Chevy Nova in the parking lot of a factory in the City of North Tonawanda, New York. The factory parking lot was adjacent to a junkyard with abandoned vehicles. It is undisputed that Petitioner Robie Drake, herein referred to as the defendant, shot Smith and Rosenthal a combined 19 times, to death, shortly after midnight. (Trial transcript at 482-95).

The only issue at trial was whether Drake had the requisite intent for second-degree murder. Drake's theory of defense was that he did not know the two victims were in the car.

At trial, the prosecution called Mr. Richard Walter to testify about a syndrome known as "picquerism," where one commits violent acts as a means of effectuating a perverted sexual urge. Upon hearing all of the evidence, a jury found Drake guilty of second-degree murder. Drake is incarcerated, having received two consecutive terms of 20 years to life.

After years of unsuccessful appeals, Drake alleges that Walter may have committed perjury during his testimony in regards to his credentials and qualifications.

Procedural History

A judgment was entered against the defendant in Niagara County Court on December 1, 1982, convicting the defendant, after a jury trial, of two counts of Murder in the Second Degree [N.Y.P.L. § 125.25 (1)]("intent to cause the death of another person"). In connection with these convictions, the defendant was sentenced to two consecutive indeterminate terms of imprisonment of twenty (20) years to life (DiFlorio, J.). The defendant appealed his conviction to the Fourth Department of the Appellate Division of the New York State Supreme Court. On April 3, 1987, the Appellate Division affirmed the conviction. *People v. Drake*, 129 N.Y.A.D.2d 963 (4th Dept. 1987). Leave to appeal to the New York State Court of Appeals was denied on March 3, 1987. *People v. Drake*, 71 N.Y.2d 895 (1987). The defendant subsequently brought a writ of error coram nobis before the Appellate Division on the basis of the ineffective assistance of appellate counsel. The defendant was denied coram nobis relief on June 9, 1995. *People v. Drake*, 216 N.Y.A.D.2d 968 (4th Dept. 1995). A motion for reargument was subsequently denied on September 29, 1995.

The defendant then brought a motion to vacate the instant judgment pursuant to N.Y.C.P.L. Section 440.10 on the basis of newly discovered evidence. The newly discovered evidence presented by the motion was that the testimony offered by the State's psychological expert, Richard D. Walter, was false and known to be false by the prosecution and, further, that the prosecution

had withheld from the defense at the time of trial a police report which contained exculpatory material. On August 1, 1996, the Niagara County Court denied the defendant's motion without a hearing (Fricano, J.) The summary denial was reviewed by the Appellate Division, Fourth Department, and affirmed on December 31, 1998. *People v. Drake*, 256 N.Y.A.D.2d 1159 (4th Dept. 1998). Leave to appeal to the Court of Appeals was denied on June 25, 1999. *People v. Drake*, 93 N.Y.2d 969 (1999).

A petition dated September 13, 1999, was filed with the District Court on September 21, 1999. In that petition, the defendant presented several grounds for relief including the issues briefed herein. The District Court denied the defendant's habeas corpus relief, ruling that the any possible perjury did not affect the verdict. The defendant appealed the denial of relief to the Second Circuit Court of Appeals. The Court of Appeals granted the defendant a certificate of appealability on December 17, 2001.

In its decision dated January 31, 2003, the Court of Appeals "held that: (1) the trial court's refusal to grant petitioner's request for continuance was not an unreasonable application of federal law, and (2) remand to the district court was required to determine whether the prosecution knew or should have known of its psychological expert's perjured testimony." *Drake v. Portuondo*, 321 F.3d 338 (2003).

Thus, the issues to be resolved by this Court are whether the expert, Mr. Walter, committed perjury at the original trial, whether the prosecution knew, or should have known about the perjury, and whether the perjury was harmless error.

Summary Judgment Standard

The standard for summary judgment is well-established. FRCvP 56(c) requires that a motion for summary judgment be denied unless the court determines, after reviewing all the evidence presented, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 585-588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The party seeking a summary judgment must demonstrate the absence of a genuine issue respecting any material fact. *Celotex*, at 325. A genuine issue of fact requires such evidence that a reasonable jury could thereupon return a verdict for the non-moving party and, when determining if a genuine factual issue exists, the court must consider the substantive evidentiary burdens assigned to each party. *Anderson*, 248, 254. All reasonable inferences must be drawn and all ambiguities must be resolved favorably to the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir.1995). However, the non-moving party may not rest upon unsubstantiated allegations, conclusory assertions or mere denials of the adverse party's pleading, but must set forth and establish specific facts showing that there is a genuine issue for trial. FRCvP 56(e).

Summary judgment must be granted against a party in instances when he fails to adequately establish an essential element on which he bears the burden

of proof. *Celotex*, at 322. A metaphysical or other whimsical doubt concerning a material fact does not establish a genuine issue necessitating a trial. *Matsushita Elec. Industrial Co.*, at 586. The "mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. *Anderson*, at 252." *Lockwood v. Coughlin*, 1997 WL65888 (W.D.N.Y. 1997).

Standard For Limited Review In Habeas Corpus Cases

In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), the Supreme Court addressed the grounds for a writ as established by the 1996 Antiterrorism and Effective Death Penalty Act (the AEDPA) in habeas corpus cases that deal with claims adjudicated on the merits in state court. According to the Court:

"the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, at 362

Under both the "contrary to" and "unreasonable application" standards, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the state court reached the wrong

conclusion. Rather, the court's "inquiry should ask whether the state court's application of clearly established law was objectively unreasonable." *Williams v. Taylor*. "Thus, a federal habeas court is not empowered to grant the writ when, in its independent judgment, it determines that the state court incorrectly applied the relevant federal law. The state court's application must reflect some additional increment of incorrectness such that it may be said to be unreasonable." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000). Additionally, the AEDPA requires that "a determination of a factual issue made by a State court shall be presumed to be correct" and the Petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(i).

In the case at hand, the above standards for summary judgment and habeas corpus review are to be applied to three main issues: whether Mr. Walter committed perjury, whether the prosecution knew or should have known about the perjury, and whether the perjury prejudiced the defendant.

A. Mr. Walter Did Not Commit Perjury

"In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. §§ 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See §§ 1621(1); *United States v. Debrow*, 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed. 92 (1953); *United States v. Norris*, 300 U.S. 564, 574, 576, 57 S.Ct. 535, 539, 540, 81 L.Ed. 808 (1937). This

federal definition of perjury by a witness has remained unchanged in its material respects for over a century. See *United States v. Smull*, 236 U.S. 405, 408, and n. 1, 35 S.Ct. 349, and n. 1, 59 L.Ed. 641 (1915).” *U.S. v. Dunnigan*, 113 S.Ct. 1111, 1116 (S.Ct. 1993).

As explained below, there was no perjury in defendant’s trial. There is no evidence that Mr. Walter intentionally gave any false testimony during the trial. At most, Mr. Walter’s statements may have been confusing or mistaken. However, in all cases, his statements were factually based.

1. Mr. Walter’s Statements Regarding His Experiences At The Los Angeles County Coroner’s Office Were Truthful

Walter testified that, during his time as a **student professional worker** at the Los Angeles County Coroner’s Office, approximately 40,000 cases came through the office (Trial Testimony 789). Mr. Walter then testified to his involvement in those cases:

“District Attorney Broderick: How many of those cases did you have anything to do with yourself?

Mr. Walter: Between 7,500 to 10,000.

Broderick: When you say that you didn’t handle those cases yourself, did you?

Walter: No. I had **personal involvement** with at least five thousand seventy-five hundred of **some capacity** in terms of investigation. (Emphasis added).

Broderick: And that would be advisory?

Walter: Right.

Broderick: How many of those cases could you estimate for us in just a ballpark figure would be homicide, that is, murder or manslaughter cases?

Walter: The best estimate would be about five thousand.

Broderick: And again what—what information were you given in connection with making the determinations that you made in the preparation of these profiles?

Walter: Well, you not only had the police report in terms of what they found at the scene. You also had the crime photos, and then you also had the deceased and the body and the

autopsy findings that were coming forth. So you had some basis to make some opinion on.

Broderick: Did you have access to lab results?

Walter: Right.

Broderick: Witness's statements?

Walter: Right.

Broderick: Did you have an opportunity to view the actual victim of the homicide?

Walter: Yes.

Broderick: Study their wounds, injuries?

Walter: Yes.

Broderick: Consult with pathologists?

Walter: Right.

Broderick: In conjunction therewith did you have an opportunity to review other evidence collected in these cases?

Walter: Yes.

Broderick: And as I understand it, then you would prepare the profile?

Walter: Right." (T. 789-791)

When Walter was questioned under oath, pursuant to the Second Circuit court-ordered discovery proceedings, about these previous in-court statements, Mr. Walter affirmed that during his time at the L.A. County Coroner's office, he crossed paths with 5,000 to 7,500 cases (Walter Deposition on July 30, 2003, p.90). Mr. Walter went on to say that while he did have low level responsibilities such as cleaning glass tubes and filling bottles, he would constantly be looking at cases and inquiring with detectives to learn as much as possible (Walter Dep., p. 94-95). All the information that came into the Coroner's Office, police investigation, toxicology and pathologist reports went through Walter's hands. Lots of times, Mr. Walter would give his opinion to police officers or pathologists, at their request, about criminological, psychological or forensic matters on cases, although he never produced any written reports (Walter Dep., p. 95-96, 117). When the defendant's attorney asked Walter to giving an example, Walter readily recounted a case where a sexual assault/murder victim had burn marks on her

hands. The pathologist who was working on the case asked Walter for his opinion and Walter told the pathologist that he thought the burn marks came from the victim holding onto bare wires connected to a generator. Subsequent investigation proved Walter correct. (Walter dep., p. 96)

The defendant contends that a June 11, 1993 statement from Dr. Griesemer is proof of Walter's perjury. Dr. Griesemer was Mr. Walter's supervisor during his time at the Los Angeles County Coroner's office. Dr. Griesemer, in a written statement **prepared by the defendant** (in which Griesemer's name was spelled wrong), said that Mr. Walter "did laboratory support: He control (sic) the identification and storage of specimens. Prepared containers with labels and powders. Cleaned glassware and stored supplies." (Griesemer June 11, 1993 Statement, p.2). Dr. Griesemer also stated that Mr. Walter did not perform any psychodynamic analysis or crime scenes or suspects, nor perform any work psychological in nature while at that office. *Id.* at 3.

A much more detailed account by Dr. Griesemer, prepared by Griesemer himself on October 16, 1995,, presents a complete picture of Walter's duties at the Coroner's Office. According to Dr. Griesemer, Walter:

would read through as many of these reports and review items as he could and he was continually discussing cases with Coroner's staff members and similarly interested people from outside such as police officers, detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances in individual causes of death for specific Coroner's cases. Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Corner. He also attended the scientific departmental discussions in meetings of both the Toxicology Section and Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-

one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department.

A copy of Dr. Griesemer's October 16, 1995, letter is attached hereto as exhibit A.

Dr. Griesemer's statement shows that Walter was part of the support staff at the Coroner's office. While Walter was not someone who would have a great deal of structured input in the cases that came into that office, the purpose of him being there as a student intern was to become acquainted with the manner in which those investigations progressed, and to familiarize himself about that line of work when the opportunity was present. It is clear that Walter was at the Coroner's office in a learning capacity and he made that clear in his testimony at the defendant's trial.

It is also important to take into consideration what Mr. Walter did *not* say. At no point in his trial testimony did Mr. Walter state that he was the one writing any reports for the Coroner's office, that he was leading any investigations, that he was testifying before the grand jury, or that he was testifying before a petit jury. Instead, the testimony at the defendant's trial shows that Mr. Walter's time at the Coroner's office was not spent as a supervisor or as a lead case officer, rather he "was a *student* professional worker at the time, while [he] was taking an academic course work in criminal justice." (Trial transcript at 788).

On cross-examination during the trial, the defense counsel never bothered to inquire further into the subject of Mr. Walter's experience with the Coroner's office. The defense never developed what Mr. Walter meant when he said he

had “participated” in 7,500 cases while with the Coroner’s office, nor did the defense develop what Walter meant when he said he had an “advisory” role. Further, the defense never asked Walter if he testified in court for the Coroner’s office about profiling or if he had written any reports. This is a subject that the defense had an opportunity to explore and develop during cross-examination; it was not the prosecutor’s job.

As it stands, however, Mr. Walter’s original in-court statements were, in fact, truthful as to what he did and to what his role was while employed with the L.A. County Coroner’s office.¹

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The American Academy of Forensic Sciences, Ethics Committee, investigated the complaint from the defendant concerning Walter’s testimony. The Committee determined that there was no violation of the Academy’s *Code of Ethics and Conduct*. A copy of the Committee’s decision is attached hereto as exhibit B.

2. Mr. Walter Did Lecture At Northern Michigan University

The next issue regarding Mr. Walter's qualifications is his testimony at trial that he was an adjunct lecturer at Northern Michigan University. At the original trial, Mr. Walter did state that he was an "adjunct *lecturer* at Northern Michigan University." (Trial transcript at 784) In his later deposition on July 30, 2003, he stated that he lectured at Northern Michigan University as a guest of a professor (Walter Dep., p.75), thus he could be considered an adjunct lecturer (Walter Dep., p. 73). In fact, Mr. Walter testified that the professor for whom he was lecturing referred to him as an adjunct lecturer (Walter Dep., p.73), and Mr. Walter produced a letter from that professor, who states that Walter was an adjunct in his course (Walter Dep., p.68, deposition exhibit 29). Additionally, at no point in his trial testimony did he state that he was a professor, nor that he was employed by the University.

3. Mr. Walter Was A Limited Psychologist At The Michigan Department Of Corrections And He Never Stated Otherwise

The next issue regarding Mr. Walter's qualifications is whether he wrongfully represented himself at trial as a psychologist while he was employed at the Michigan Department of Corrections. According to his licensing, Mr. Walter was a "limited psychologist" and, according to the relevant Michigan Law, the limitations on that license "shall prohibit advertising or other representation to the public which will lead the public to believe the individual is engaging in the practice of psychology." Michigan Comp. Laws Ann. § 333.18223(2). However, at no point did Mr. Walter state that he was a psychologist. Rather, when asked his profession, Walter responded that he was a "prison psychologist" (Trial transcript at 783), an answer that was correct, since at the time he was employed

at a Michigan prison as a limited psychologist, and was licensed as a limited psychologist (Michigan Board of Psychology License). Further, at the original trial on cross-examination, Mr. Walter made it clear that he had earned only a Masters Degree, and not a Ph.D. in psychology:

“Mr. Perry: Mr. Walter, did you say you had a Masters Degree?

Mr. Walter: Yes

Perry: Ph.D. in psychology. Is there one or do you have one, do you have one?

Walter: No, I do not.” (Trial transcript at 805)

It is clear from this testimony that Mr. Walter did not present himself as being in a position with the Michigan Department of Corrections that was incorrect in any way.

4. Mr. Walter Truly Believed He Had Testified Previously As An Expert

Finally, there is a question as to whether Mr. Walter wrongfully represented himself by misstating his previous expert testimony. At the original trial, Mr. Walter offered that he had previously testified as an expert in Los Angeles County and in Pasadena:

“Broderick: Have you ever been qualified to testify as an expert witness in any criminal court?

Walter: Yes

Broderick: And what states and jurisdictions, if you would, please.

Walter: In California, Los Angeles County and in Pasadena.” (Trial transcript at 785),

According to the later deposition, there is a discrepancy as to whether Mr. Walter stated that he was qualified in two locations, Los Angeles County *and* in Pasadena, or whether it was one location, Los Angeles County in Pasadena (Walter Dep., p.85). As Pasadena is a locality within Los Angeles County, it is

possible to be qualified as an expert in Pasadena and in Los Angeles County in one instance.

Also, it now appears that Mr. Walter was never actually qualified as an expert back in Los Angeles County. Instead, the testimony Mr. Walter gave was regarding the chain of evidence procedures within the Coroner's office:

“Mr. Jay: Where had you been qualified to testify as an expert witness in a Criminal Court in 1982 before October 17th – or 22nd, pardon me?

Mr. Walter: That's what we were talking about earlier. I said in Pasadena, not as an expert in psychology. It was the expert on the chain of evidence on that particular case.

Mr. Jay: But, sir, when a chain of evidence person testifies, they're not testifying as an expert, are they?

Mr. Walter: I believe they were.

Mr. Jay: You believe they are?

Mr. Walter: Yeah.” (Walter Dep., p.84-85)

While Mr. Walter believed that he was testifying as an expert, that he had scientific expertise and knowledge beyond that of a layperson, he was incorrect in interpreting that this was a situation in which he could be deemed an expert by the Court. Mr. Walter made no attempt to deceive or mislead the Court in that instance.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court stated, “The subject of an expert's testimony must be “scientific ... knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science....The term ‘applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’” 509 U.S. 579, 589, 113 S.Ct. 2786 (1993). While Mr. Walter testified to the scientific procedures used by the Coroner's office, he did not testify to anything that should be seen as an immutable truth or a scientific fact. Mr. Walter may have seen

himself as a scientist, but he did not realize that what he was testifying to did not constitute expert testimony.

In this circumstance, we clearly have a case of confusion rather than one of willful intent to mislead. As Mr. Walter thought he had been qualified as an expert within each of those geographic regions, he therefore believed the testimony he gave was factual.

It is easy to misunderstand exactly what Walter said when he originally testified at trial. Even the Second Circuit Court of Appeals got the facts regarding Walter's testimony incorrect in their decision. The Court stated that Walter claimed that he had "an adjunct professorship at Northern Michigan University;...and expert testimony given at hundreds of criminal trials in Los Angeles and Michigan." *Drake v. Portuondo*, 321 F.3d 338 at 342 (2d Cir. 2003). Unmistakably, nowhere in his testimony did Walter state that he was an adjunct *professor* at Northern Michigan, and at no point did Walter mention that he had previously testified at *hundreds* of trials. If the Second Circuit is getting some of the facts wrong, then part of the testimony is easily misconstrued. However, this does not imply that Walter was perjuring himself on the stand, and upon a closer inspection of the testimony, the evidence shows that perjury did not occur.

5. Walter Did Not Invent the Diagnosis of Picquerism

Contrary to the defendant's assertions, Walter did not invent the diagnosis of picquerism. Although the term does not appear in the DSM manuals, the term appears in numerous, serious, criminal investigative works, including:

V. Geberth, Practical Homicide Investigation, Tactics, Procedures and Forensic Techniques, 470, 765-6 (3rd ed. 1996).

Arrigo and Purcell, *Explaining Paraphilias and Lust Murder: Toward and Integrated Model*, 45 International Journal of Offender Therapy and Comparative Criminology 1 (2001).

R. Morneau and R. Rockwell, Sex, Motivation and the Criminal Offender, 146-153 (1980).

J. DeRiver, Crime and the Sexual Psychopath, 46-9 (1958).

**B. Even If Mr. Walter's Testimony Was Perjurious,
The Prosecution Did Not Know, Nor Should the
Prosecution Have Known, That The Statements Were False.**

Not only did the prosecution not know that Walter's testimony might have been perjurious, there was no reason for the prosecution to have known that the testimony was anything but truthful.

**1. The Prosecution Did Not Know Of Any Possible
Perjury By Mr. Walter**

There is no evidence indicating that the prosecution, at any time, knew that Mr. Walter may have committed perjury. At no time did Walter indicate to the prosecutor, now Honorable Peter E. Broderick, that he was not telling the truth. Prior to heading into court, while questioning Mr. Walter about his qualifications, the prosecutor discovered and was impressed by the fact that Walter was a member of the American Academy of Forensic Sciences. (Nov. 26, 2003, Broderick, pp. 28-9). Once in court and under oath, the prosecutor questioned Mr. Walter about his educational background and his prior testimony as an expert. Mr. Walter responded to these inquiries by stating his degrees (Trial transcript at 783), and that he had been qualified as an expert in court before. (Trial transcript at 785).

The prosecutor stated that he did not go into great detail about an expert's education and experience prior to the in-court testimony because that expert would be testifying under oath anyway and be subject to perjury charges. (Nov. 26, 2003, Broderick, p.52). When it came to questioning experts about their credentials, the prosecutor testified that this was something that he never did for his own experts, so here he followed his normal procedure and did not call anyone to check on Walter's credentials. *Id.* at 31. Because Walter did not tell the prosecutor that Walter was lying and because the prosecutor did not learn from any outside sources that Walter was lying, the defendant has failed to prove that the prosecutor knew that Walter was committing perjury.

The defense argues that an inference can be made regarding the prosecution's knowledge of Mr. Walter's possible perjury because Mr. Walter was called at the last minute with little notice to the defense and because there was no written report provided ahead of time. As explained below, neither of these inferences are supported by the facts in the case.

Mr. Walter's testimony was not deemed necessary by the prosecution until shortly before the trial, and in fact, the prosecution did not even know of Mr. Walter until just before the trial. An initial report prepared by a pathologist at the Erie County Medical Examiner's Office indicated the presence of sperm in the female victim's rectum. The prosecutor was relying upon the presence of sperm in the rectum to provide a motive and evidence of intent. As the prosecutor put it "at that point in time I had no need for anybody to explain this case. I had the explanation because I had a slide that said there was sperm in her rectum." (Nov. 6, 2003, Broderick p. 48).

Several weeks before trial started on October 19th, perhaps during September, the defense made a supplemental motion to inspect the slides which contained the material taken from the female victim's rectum. The prosecutor contacted Dr. Uku at the Medical Examiner's Office in Erie County to obtain the slides. Dr. Uku indicated that he did not know where the slides were and that the pathologist who had been working on them had been let go. The next day, Dr. Uku called the prosecutor and told him that he had found the slides but that the slides did not contain any sperm. The prosecutor then called the defendant's trial attorneys to inform them. (Aug. 21, 2003, Broderick, p. 36; Nov. 26, 2003, Broderick, p. 50).

Shortly thereafter, perhaps around of the first of October, the prosecutor talked with Dr. Levine, a forensic odontologist who had previously testified in a sensational case in Erie County. (Nov. 26, 2003, Broderick, pp. 41, 45, 49). Dr. Levine was scheduled to testify in the defendant's case about the bite marks on the female victim's breast. The prosecutor told Dr. Levine that he had lost the rectal sperm evidence and Dr. Levine told him that he should talk with Walter. (Aug. 21, 2003, Broderick, p. 38). Dr. Levine told the prosecutor that Walter, like Levine, was a member of the American Academy of Forensic Sciences and he worked in a Michigan state prison where his job was to debrief serious sex offenders, their families and the probation department in an effort to determine why they did what they did. (Aug. 21, 2003, Broderick, p. 38 – 39). The prosecutor contacted Walter, with the first contact on October 7th, just 12 days before opening statements on October 19th. *Id.*

Around October 1st, the prosecutor called Walter for the first time and gave him a thumbnail sketch of the case. Walter told the prosecutor that he would need some time to think about it. Sometime later that afternoon or the following morning, Walter called the prosecutor back and told the prosecutor that he thought picquerism was involved. The prosecutor had never heard of the term. Walter explained what picquerism meant and told the prosecutor that he had several books and he would send them. A couple of days later, the prosecutor received a green, hard-covered book, entitled *Sex, Motivation & the Criminal Offender* by Dr. Robert Morneau. Morneau's book had a chapter on picquerism. Walter also sent a second book which had some information on picquerism. (Aug. 21, 2003, Broderick, pp. is 43-47).

The night before Walter testified, the prosecutor picked Walter up at the airport. During the drive from the airport, Walter, based on his psychological insights, told the prosecutor facts about the case that the prosecutor had not disclosed to Walter. First, Walter told the prosecutor that oftentimes individuals who engage in this kind of conduct are so exhausted at the conclusion that they fall asleep. According to the prosecutor, when detective Giles transported the defendant to the police station from the scene of the crime, the defendant was asleep. (Nov. 26, 2003, Broderick, p. 28). Second, Walter told the prosecutor that people with picquerism often start out as Peeping Toms. According to the prosecutor, the defendant either had a charge or conviction for such an offense. *Id.* at 35. Third, Walter told the prosecutor that people with picquerism often subscribe to soldier of Fortune/commando type of magazines. According to the prosecutor, "the evidence in the case, which I didn't consider relevant at the time,

was that his room had a significant number of those types of magazines and that I had never related that fact to him and it wasn't important in my mind at the time and when he [Walter] said that to me it suddenly like hit me right between the eyes that here's a piece of the case that fit the profile." *Id.* at 36.

Walter's insights into the case gave the prosecutor confidence in Walter's ability, qualifications and expertise to testify at trial. According to the prosecutor, "it just convinced me that he was correct in his opinion." *Id.* at 38. It was at that point that the prosecutor decided that he could present Walter to the court. *Id.* at 31. After the drive from the airport, the prosecutor gave Walter the grand jury testimony and police reports. Walter testified the next day.

The above sequence of events explains why the prosecutor did not tell the defense about Walter before the trial and why there was no written report. The Court should note that under New York's Criminal Procedure Law, there is no requirement to produce a written report, only a requirement to provide a copy if a written report is produced. Finally, Niagara County Court, Hon. Amy J. Fricano, dismissed the defendant's CPL Article 440 proceeding ruling that the defendant failed to prove that the prosecutor knowingly allowed false testimony. Under AEDPA and the above chronology, Judge Fricano's ruling was not an unreasonable application of federal law.

2. The Prosecution Should Not Have Known of Any Possible Perjury by Walter

Not only did the prosecution not know of any perjury by Walter, there was no reason that the prosecution should have known of any perjury. First, Walter was recommended by Dr. Levine, a respected forensic odontologist, who had

previously testified in a high visibility case in Erie County and the prosecutor relied upon this referral when looking at Walter's qualifications. (Nov. 26, 2003, Broderick, pp. 41, 45, 49);(Aug. 21, 2003, Broderick, p. 38).

Second, as explained above, the prosecutor discussed the case with Walter to get a feel for him. Upon discussing this case with Mr. Walter, the prosecutor found that Mr. Walter was aware of facts that he would not have known without the understanding and insight of being a psychological expert. (Nov. 26, 2003, Broderick, pp. 28, 35-6.).

Third, Walter, like Levine, was a member of the American Academy of Forensic Sciences, an organization that the prosecutor had heard of. *Id.* at 29. Since Walter was a member of this respected national organization, it would naturally lead one to believe that he was a reputable source of information in his area of expertise.

Fourth, Walter supplied the prosecution with a book entitled *Sex, Motivation & the Criminal Offender* by Dr. Robert Morneau. This book, a copy of which was made available at the deposition of Walter, confirmed the specifics of the condition of picquerism, and supported Walter's testimony. The book was not "pulp fiction," but rather an academic work on psychological conditions. (Aug. 21, 2003, Broderick, pp. is 43-47; deposition exhibit, 17).

Fifth, the prosecution did not know, and should not have known, that Walter may have embellished the number of cases that he dealt with during his year at the L.A. County Coroner's office, as well as the detail in which he dealt with those cases. The prosecutor testified that he had not questioned this number with Walter during the trial because he had no idea what Walter's

caseload may have been at that office (Nov. 26, 2003, Broderick, pp. 38-9). The prosecutor had no basis for knowing what the caseload of the L.A. County Coroner's office would be in a given time period, nor would he have any idea of the normal duties and responsibilities of a given employee in that office. Also, the prosecutor should not have known that these numbers may have been an embellishment because it was facially possible for that many files to cross one's desk in the two and-a-half years that Walter spent at the Coroner's office, assuming that person looks at approximately 8-12 files per day.

Sixth, all of the above comported with the prosecutor's normal method of dealing with experts. The prosecutor had never previously telephoned or written an expert's employer to verify the expert's credentials, and he did not do so in this case. (Nov. 26, 2003, Broderick, pp. 32-5).

Seventh, no Supreme Court case has ever imposed an obligation on a prosecutor to contact an expert's employer to verify the expert's credentials. Habeas corpus petitions can be granted only if the state court's decision "was contrary to...clearly established Federal law, as determined by the Supreme Court of the United States,..." (see *Williams v. Taylor*, *supra*).

**C. Even If Walter Committed Perjury,
the Judgment Should Not Be Vacated**

As explained below, even if Walter committed perjury, there was overwhelming evidence of the defendant's guilt and this Court should not vacate his judgment of conviction.

1. Standard for Reversal

Beginning in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and continuing through *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976), the Supreme Court has held that “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” The Supreme Court and the Second Circuit have both applied this rule, *in dicta*, to cases where the prosecution should have known about perjury. *Id.*; see *Su v. Fillion*, 335 F.3d 119 (2d Cir. 2003). However, the Second Circuit has drawn a distinction between intentional and unintentional use of perjury. If a witness perjures himself, but the government is unaware of the perjury during trial, “a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.” *United States v. Moreno*, 181 F.3d 206, 213 (2d Cir.) (citations omitted), *cert. denied*, 528 U.S. 977, 120 S.Ct. 427, 145 L.Ed.2d 334 (1999). As explained below, even under the more stringent standard of intentional use of perjury, the Court should not vacate the judgment of conviction.

2. There Is No Reasonable Likelihood That the False Testimony Could Have Affected the Judgment of the Jury

Walter’s testimony went to motive and intent. However, Walter was not the only source of evidence that pointed to the defendant’s intent. The overwhelming volume of evidence indicates the intent of the defendant. As explained below, even without the testimony of Mr. Walter, there was an ample basis for the jury to conclude that the killings were intentional, rather than

accidental as the defendant claimed that he did not know there was anyone in the car.

There was testimony by a firearms examiner that, due to the gun powder residue recovered from the sweatshirt of one of the victim's sweatshirt, the defendant stood no more than eight (8) feet away from the victim's car while shooting, although a strong wind could have carried the gunpowder particles, and could make the shooter seem closer to the target than he actually was (Trial transcript at 569, 595, 598).

There was evidence that the defendant described the windows as "fogged up" to the police (Trial transcript at 278), a condition that only would have occurred if the vehicle were occupied.

There was testimony that the car in which the victim's were killed, although in poor condition, was clearly not abandoned due to the presence of the license plates and registrations sticker, which would have been visible due to the lighting in the dump (Trial transcript at 225).

There was evidence that the car was parked just off the road and not in an isolated area (Trial transcript at 289, 1024).

There was evidence that, despite the defendant's statement that he merely wanted to destroy the car (Trial transcript at 275), the only bullet holes in the car were in the passenger's side window (Trial transcript at 69, 268, 1027).

There was evidence that one of the victims suffered two bullet wounds to the head, and the other victim suffered 15 bullet wounds to the head, face and chest, and 2 stab wounds to the back of his body (Trial transcript at 482-495).

There was testimony that showed the defendant stabbed one of the victims after shooting him and hearing moans from the car he was in (Trial transcript at 700).

There was evidence showing that the defendant bit the left breast of one of the victims after shooting her (Trial transcript at 639, 656, 683).

There was evidence that the defendant may have known the victims from school (Trial transcript at 556, 624-626), and may have had a problem with one (Trial transcript at 557-559).

There was evidence that the defendant told a fellow prisoner that he had seen one of the victims while he was firing and that he meant to kill him when he stabbed him (Trial transcript at 723-724).

The cumulative weight of the above evidence would have been more than enough for a jury to find that the defendant intended to kill the victims when he began shooting at them.

Mr. Walter's testimony was offered to explain why the defendant committed these acts, a motive. He provided an explanation that the jury could have accepted or disregarded, yet still have come to the same guilty verdict because of the gravity of the volume of other evidence. Mr. Walter's testimony offered nothing that the jury needed to rely upon in order to come to the conclusion that the defendant knew the victims were in the car at the time he started shooting. The Supreme Court has stated that "Proof of motive is never indispensable to conviction for crime." *Pointer v. U. S.*, 151 U. S. 396, 14 S.Ct. 410 (1896). Thus, even without Mr. Walter's testimony, the jury could have found that the killings were intentional.

**3. The Defendant Failed to Use Due Diligence
to Discover the Perjury**

In *United States v. Helmsley*, 985 F.2d 1202, 1208 (2d Cir.1993), the Second Circuit held that, “at least for purposes of a collateral attack, a defendant is normally required to exercise due diligence in gathering and using information to rebut a lying prosecution witness.” The Second Circuit has made it clear that one way a defendant can rebut a lying prosecution witness is through effective cross-examination. Unlike the case in *Su v. Filon*, 335 F.3d 119 (2d Cir. 2003), where a lying prosecutor made effective cross-examination impossible, in defendant’s case, defendant’s trial counsel failed to ask any of the questions that his present counsel now asserts the prosecution should have asked its own witness. The defendant cannot have it both ways. He cannot fault the prosecution for not asking the same questions that he failed to ask.

Conclusion

Based on the above, the Respondent respectfully requests this Court to grant the Respondent’s motion for summary judgment.

Dated: September 24, 2004

Respectfully submitted,

BY: s/Thomas H. Brandt

THOMAS H. BRANDT
Assistant District Attorney
MATTHEW J. MURPHY, III
Niagara County District Attorney
Niagara County Courthouse
(716) 439-7085
Lockport, New York 14094
tombrandt1kpt@yahoo.com

TO: CLERK,
UNITED STATES DISTRICT COURT
David Jay, Esq.

Exhibit A

I HEREBY CERTIFY THIS TO
BE A TRUE AND CORRECT COPY

Ernest C. Griesemer

October 16, 1995

Don Harper Mills, M.D., J.D.
Chairman, Ethics Committee
American Academy of Forensic Sciences
911 Studebaker Road, Suite 250
Long Beach, CA 90815

RE: Richard Walter

Dear Dr. Mills:

Richard Walter worked in the Forensic Sciences Laboratories of the Department of Coroner, Los Angeles County, Los Angeles, California for two and a half years from 1/76 to 8/78. He was employed as a Student Professional Worker and worked with the Forensic Sciences, Toxicology and Histopathology Laboratories. He had a major responsibility for the chain of evidence control for all items submitted to the Laboratories and their storage. These items included, but were not limited to: blood samples, medical evidence including drugs, solutions, powders, heart pacemakers, blood purification equipment and other forensic evidence items such as stained clothing, household equipment suspected of containing residues; for example, eating paraphernalia. This list is only representative due to the limits of space. A comprehensive list would be exhaustively long.

Associated with the cases that involved these several items, all of which were accessible to Mr. Walter: Pathologist's evaluation reports concerning the circumstances and cause of death; also, Coroner's investigation reports, consulting physician reports, hospital reviews, police reports, and other related data and reviews directly related to individual death cases. All of these constituted extensive and often vast amounts of background information related to the death of an individual human being. While he was working here, I noted that Mr. Walter would read through as many of these report and review items as he could and he was continually discussing cases with Coroner's staff members and similarly interested people from outside such as police officers, detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death for specific Coroner's cases.

Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Coroner. He also attended the scientific departmental discussions in meetings of

Don Harper Mills, M.D., J.D.
RE: Richard Walter
October 16, 1995
Page # 2

both the Toxicology Section and Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department.

I know that Mr. Walter had extensive experience in mentally digesting background information of a very large number of Coroner's cases to which he was exposed while he was working here in the Coroner's Department of Los Angeles County, Los Angeles, California. In recent years, this county's case load was over 17,000 cases and he would have had direct understanding of the situation and cause of death in many of them.

Sincerely,

Ernest C. Griesemer

E. C. Griesemer, Ph.D.
1716 Edgecomb St.
Covina, CA 91724

I HEREBY CERTIFY THIS TO
BE A TRUE AND CORRECT COPY

Ernest C. Griesemer

STATE OF California)
COUNTY OF Orange) SS:

On this 13th day of Aug, 2004, before me a Notary Public, the undersigned office personally appeared E.C. GRIESEMER, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he is the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Taline Estrada
NOTARY PUBLIC

ADDRESS:

2781 W. MacArthur Blvd-B
Santa Ana, CA 92704

COMMISSION EXPIRES:

9-20-07



United States District Court
Western District of New York

Robie J. Drake,

Affidavit

Petitioner,

v.

L.A. Portuondo

Respondent.

State of California)
County of Orange) ss:

Ernest C. Griesemer, being duly sworn, deposes and says:

1. I am retired from my employment in the Los Angeles County Department of Coroner and make this affidavit in support of the respondent's motion for summary judgment.
2. Attached to this affidavit is a letter that I authored on October 16, 1995 in connection with the allegations that Richard Walter had testified untruthfully at the petitioner's criminal trial concerning his qualifications and work experience while he was working in the Los Angeles County Department of Coroner.
3. The letter was submitted to the American Academy of Sciences, which was investigating the allegations.
4. The letter was true and accurate on October 16, 1995, and it remains true and accurate as of today's date.

Ernest C. Griesemer
Ernest C. Griesemer, Ph.D.

Sworn to before me
the 28th day of Aug., 2004
Notary Public

Taline Estrada

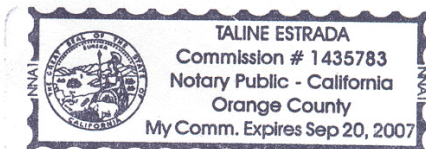


Exhibit B



AMERICAN ACADEMY OF FORENSIC SCIENCES

P.O. Box 669 • Colorado Springs • CO 80901-0669 • 719/636-1100 • Fax 719/636-1993

911 Studebaker Road, Suite 250

Long Beach, CA 90815

Phone: (310) 431-7272 Fax: (310) 431-2009

**CONFIDENTIAL
MEMORANDUM**

February 2, 1996

Mrs. Marlene V. Drake
19 East Park MHC
Hyde Park, N Y 12538

RE: Richard D. Walter

Dear Mrs. Drake:

The Committee has reviewed your complaints and transcripts and has sought additional comments from Michigan and California. Most of the issues do not involve the Academy's Code of Ethics. Though Mr. Walter's representation of status in Michigan and of experiences in California do fall within the purview of the Code, the Committee has concluded unanimously that there was no material misrepresentation and therefore no Code violation.

Very truly yours,


Don Harper Mills, M.D., J.D.
Chairman, Ethics Committee

DHM/sdh

OFFICERS 1995-1996

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Woodstock, IL

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New York, NY

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Colorado Springs, CO 80904-2798

Federal I.D. Number 87-0287045

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329

Petitioner,

vs.

99-CV-0681E(Sr)

L.A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility

Respondent.

Certificate of Service

I hereby certify that on September 28, 2004, I electronically filed the foregoing Amended Notice of Motion for Summary Judgment with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

None

And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

DAVID GERALD JAY, ESQ.
120 Delaware Avenue, Suite 200
Buffalo, New York 14202

/s/ Thomas H. Brandt
District Attorney's Office
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094
(716-439-7085)
E-Mail: Tom.brandt@niagaracounty.com

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner

- against -

RESPONDENT'S REPLY
MEMORANDUM

L. A. PORTUONDO,

Docket No. 1:99-cv-681

Respondent

Introduction

The Respondent moved for summary judgment in the above-captioned habeas corpus proceeding and filed a memorandum in support. The Petitioner filed a memorandum in opposition. In his memorandum, the Petitioner argued that “there are major differences of opinion as to the proven facts and more major disputes as to the inferences that can be drawn from them,” making summary resolution inappropriate. The Petitioner argues that the prosecution’s expert witness, Mr. Richard Walter, committed perjury during trial and the prosecutor should have known of that perjury. See Petitioner’s memorandum at 2. The Petitioner’s memorandum examines Walter’s trial testimony concerning his academic credentials, publications, previous expert testimony, training in California, and status as a psychologist in Michigan, and then compares the testimony with Walter’s testimony in his deposition and with the prosecutor’s testimony in his deposition to argue that Walter committed perjury and that the prosecutor should have known about it. As shown below, the Petitioner’s arguments are meritless.

Walter's Alleged Perjury

Academic Credentials

At trial, Walter testified that he was an “adjunct **lecturer** at Northern Michigan University.” See trial transcript at age 74. At his deposition, Walter never contradicted that testimony. (Walter Dep., pp. 68 – 75). Instead, he testified that he lectured at Northern Michigan University as a guest of a professor (Walter Dep., p.75), thus he could be considered an adjunct lecturer (Walter Dep., p. 73). In fact, Mr. Walter testified that the professor for whom he was lecturing referred to him as an adjunct lecturer (Walter Dep., p.73), and Mr. Walter produced a letter from that professor, who states that Walter was an adjunct in his course (Walter Dep., p.68, deposition exhibit 29).

The Respondent submits that based on the above, there is no issue of fact. The Petitioner does not dispute Walter's deposition testimony. Instead he argues that “[Walter] persists in **believing** that when he appeared as a guest lecturer at Northern Michigan University, that he attained the academic rank of adjunct lecturer.” See Petitioner's memorandum at 8 (emphasis added). However, as long as Walter believed that he had attained the academic rank of adjunct lecturer, Walter did not commit perjury at trial. Moreover, based on the letter from the professor who invited Walter to teach, Walter had a good faith belief concerning his status as an adjunct lecturer. In any event, what goes unsaid in the Petitioner's memorandum is an explanation of the difference between a guest lecturer and a guest professor, how the prosecutor should have known about that difference and how that difference was relevant at trial.

Publications

At trial, Walter was asked “have you written any papers or articles in your field?” To

which Walter answered “yes”. Record on appeal at 784. At his deposition, Walter testified that he had written a paper on bite marks and delivered an address based on the paper to a session of the American Academy of Forensic Sciences before the trial and the paper was published after the trial. See Walter’s deposition and 34 – 43.

The Petitioner argues that “the fact of the matter is that Mr. Walter was totally unpublished in October, 1982.” See Petitioner’s memorandum at 10. However, this Court can see the Mr. Walter was never asked at trial whether he was “published”. Instead, he was asked whether he had written any papers or articles. His answer, yes, was truthful and accurate. Again, there is no issue of fact.

Testimony as an Expert

At trial, Walter testified that he had been qualified to testify as an expert witness in a criminal court, specifically “California, Los Angeles County and in Pasadena.” Record on Appeal at 785.

In his deposition, Walter testified as follows concerning his expert witness testimony in California:

“Mr. Jay: Where had you been qualified to testify as an expert witness in a Criminal Court in 1982 before October 17th – or 22nd, pardon me?

Mr. Walter: That’s what we were talking about earlier. I said in Pasadena, not as an expert in psychology. It was the expert on the chain of evidence on that particular case.

Mr. Jay: But, sir, when a chain of evidence person testifies, they’re not testifying as an expert, are they?

Mr. Walter: I believe they were.

Mr. Jay: You believe they are?

Mr. Walter: Yeah.” (Walter Dep., p.84-85)

Based on the above, there is no issue of fact concerning Walter’s activities in California and the Petitioner does not argue that there is. It is the Respondent’s position that Walter mistakenly believed that he testified as an expert in the chain of custody criminal

case. Nothing in the deposition testimony contradicts that position.

California Training

Walter testified that, during his time as a **student professional worker** at the Los Angeles County Coroner's Office, approximately 40,000 cases came through the office (Trial Testimony 789). Mr. Walter then testified to his involvement in those cases:

"District Attorney Broderick: How many of those cases did you have anything to do with yourself?

Mr. Walter: Between 7,500 to 10,000.

Broderick: When you say that you didn't handle those cases yourself, did you?

Walter: No. I had **personal involvement** with at least five thousand seventy-five hundred of **some capacity** in terms of investigation. (Emphasis added).

Broderick: And that would be advisory?

Walter: Right.

Broderick: How many of those cases could you estimate for us in just a ballpark figure would be homicide, that is, murder or manslaughter cases?

Walter: The best estimate would be about five thousand.

Broderick: And again what—what information were you given in connection with making the determinations that you made in the preparation of these profiles?

Walter: Well, you not only had the police report in terms of what they found at the scene. You also had the crime photos, and then you also had the deceased and the body and the autopsy findings that were coming forth. So you had some basis to make some opinion on.

Broderick: Did you have access to lab results?

Walter: Right.

Broderick: Witness's statements?

Walter: Right.

Broderick: Did you have an opportunity to view the actual victim of the homicide?

Walter: Yes.

Broderick: Study their wounds, injuries?

Walter: Yes.

Broderick: Consult with pathologists?

Walter: Right.

Broderick: In conjunction therewith did you have an opportunity to review other evidence collected in these cases?

Walter: Yes.

Broderick: And as I understand it, then you would prepare the profile?

Walter: Right.” (T. 789-791)

At his deposition, Walter affirmed that during his time at the L.A. County Coroner’s office, he crossed paths with 5,000 to 7,500 cases (Walter Deposition on July 30, 2003, p.90). Mr. Walter went on to say that while he did have low level responsibilities such as cleaning glass tubes and filling bottles, he would constantly be looking at cases and inquiring with detectives to learn as much as possible (Walter Dep., p. 94-95). All the information that came into the Coroner’s Office, police investigation, toxicology and pathologist reports went through Walter’s hands. Lots of times, Mr. Walter would give his opinion to police officers or pathologists, at their request, about criminological, psychological or forensic matters on cases, although he never produced any written reports (Walter Dep., p. 95-96, 117). When the defendant’s attorney asked Walter to giving an example, Walter readily recounted a case where a sexual assault/murder victim had burn marks on her hands. The pathologist who was working on the case asked Walter for his opinion and Walter told the pathologist that he thought the burn marks came from the victim holding onto bare wires connected to a generator. Subsequent investigation proved Walter correct. (Walter dep., p. 96)

A detailed account by Dr. Griesemer, one of Walter’s superiors at the Coroner’s Office, presents a complete picture of Walter’s duties at the Coroner’s Office. According to Dr. Griesemer, Walter:

would read through as many of these reports and review items as he could and he was continually discussing cases with Coroner’s staff members and similarly interested people from outside such as police officers, detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances in individual causes of death for specific Coroner’s cases. Mr. Walter also attended

the periodic case reviews and scientific discussions including Psychological Profiles held by the Coroner. He also attended the scientific departmental discussions in meetings of both the Toxicology Section and Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department.

Dr. Griesemer's statement shows that Walter was part of the support staff at the Coroner's office. While Walter was not someone who would have a great deal of structured input in the cases that came into that office, the purpose of him being there as a student intern was to become acquainted with the manner in which those investigations progressed, and to familiarize himself about that line of work when the opportunity was present. It is clear that Walter was at the Coroner's office in a learning capacity and he made that clear in his testimony at the defendant's trial.

Again Petitioner does not dispute any of the above testimony, instead he resorts to *ad hominem* attacks and argues to the Court, "I will leave to the Court to review the additional pages of Mr. Walter's deposition testimony which underscores the thesis that when he was cleaning laboratory equipment and doing grunt work at the Los Angeles Coroner's department he simply later fantasized that he was more important than he was." See Petitioner's memorandum at 20.

Prison Psychologist

At trial, Walter testified that he was a "prison psychologist." Trial transcript at 783.

At his deposition, Walter testified that because he only had a master's degree, a fact which he testified to at the trial, he held a limited license in Michigan, that the limitations on a limited license do not apply to duties performed as an employee of a governmental entity,

that within that setting, a person with a limited license could call himself a psychologist, and that he worked for the Michigan Department of Corrections and did psychological work. See Walter deposition at 80 – 81.

Once again, the Petitioner does not dispute any of the above testimony. Instead he argues that “the jury in this case was entitled to know [that the term ‘prison psychologist’ does not mean a psychologist who works in a prison, but person whose license limits them to provide services only in an governmental institution setting under strict supervision by a fully licensed Ph.D. psychologist]”. See Petitioner’s memorandum at 25. The problem with the Petitioner’s argument is that the issue before this Court is not what the jury was entitled to know. Rather, it is whether Walter committed perjury when he testified that he was a prison psychologist. The Petitioner is simply wrong when he says the term “prison psychologist” does not mean a psychologist who works in a prison. There is no testimony anywhere to that effect.

The Prosecutor Had No Reason to Know of Potential Perjury

In his motion for summary judgment, the Respondent argued that there were seven reasons why the prosecutor had no reason to suspect potential perjury. Briefly, those reasons were as follows:

First, Walter was recommended by Dr. Levine, a respected forensic odontologist, who had previously testified in a high visibility case in Erie County and the prosecutor relied upon this referral when looking at Walter’s qualifications. (Nov. 26, 2003, Broderick, pp. 41, 45, 49);(Aug. 21, 2003, Broderick, p. 38).

Second, as explained above, the prosecutor discussed the case with Walter to get a feel for him. Upon discussing this case with Mr. Walter, the prosecutor found that

Mr. Walter was aware of facts that he would not have known without the understanding and insight of being a psychological expert. (Nov. 26, 2003, Broderick, pp. 28, 35-6.).

Third, Walter, like Levine, was a member of the American Academy of Forensic Sciences, an organization that the prosecutor had heard of. *Id.* at 29. Since Walter was a member of this respected national organization, it would naturally lead one to believe that he was a reputable source of information in his area of expertise.

Fourth, Walter supplied the prosecution with a book entitled *Sex, Motivation & the Criminal Offender* by Dr. Robert Morneau. This book, a copy of which was made available at the deposition of Walter, confirmed the specifics of the condition of picquerism, and supported Walter's testimony. The book was not "pulp fiction," but rather an academic work on psychological conditions. (Aug. 21, 2003, Broderick, pp. is 43-47; deposition exhibit, 17).

Fifth, the prosecution did not know, and should not have known, that Walter may have embellished the number of cases that he dealt with during his year at the L.A. County Coroner's office, as well as the detail in which he dealt with those cases. The prosecutor testified that he had not questioned this number with Walter during the trial because he had no idea what Walter's caseload may have been at that office (Nov. 26, 2003, Broderick, pp. 38-9).

Sixth, all of the above comported with the prosecutor's normal method of dealing with experts. The prosecutor had never previously telephoned or written an expert's employer to verify the expert's credentials, and he did not do so in this case. (Nov. 26, 2003, Broderick, pp. 32-5).

Seventh, no Supreme Court case has ever imposed an obligation on a prosecutor

to contact an expert's employer to verify the expert's credentials. Habeas corpus petitions can be granted only if the state court's decision "was contrary to...clearly established Federal law, as determined by the Supreme Court of the United States,..." (see *Williams v. Taylor*, supra).

The Petitioner does not dispute any the above arguments. Instead, he argues that the prosecutor's failure to obtain a curriculum vitae or to corroborate Walter's qualifications translates into a situation where the prosecutor should have known that Walter was somehow committing perjury. See Petitioner's memorandum at 26 – 28.

This argument is meritless. To begin with, if Walter committed perjury, any curriculum vitae would be part of it rather than a check on it. Obtaining a curriculum vitae, therefore, would not have disclosed a potential perjury. Next, given the seven arguments above, there was no reason for the prosecutor to corroborate Walter's qualifications by making an independent investigation of each of Walter's qualifications. Finally, the Petitioner's cross-examination of Walter at the deposition shows the type of questions that the Petitioner's attorneys could have asked Walter while he was on the witness stand during trial and the type of information that those questions would have elicited. In short, there was no perjury; there was adequate but less than stellar cross-examination.

Conclusion

Based on the above, the Respondent respectfully requests this Court to grant the Respondent's motion for summary judgment.

/s/Thomas H. Brandt

THOMAS H. BRANDT
Assistant District Attorney
MATTHEW J. MURPHY, III
Niagara County District Attorney
Niagara County Courthouse
(716) 439-7085
Lockport, New York 14094
thomas.brandt@niagaracounty.com

TO: DAVID GERALD JAY, ESQ.
69 Delaware Avenue, Suite 1103
Buffalo, New York 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE

Petitioner,

vs.

1:99-CV-681

L. A. PORTUONDO

Respondent.

Certificate of Service

I hereby certify that on June 21, 2005, I electronically filed the foregoing Respondent's Reply Memorandum with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

None

And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

DAVID GERALD JAY
69 Delaware Avenue, Suite 1103
Buffalo, New York 14202

/s/ Thomas H. Brandt
District Attorney's Office
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094
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E-Mail: thomas.brandt@niagaracounty.com

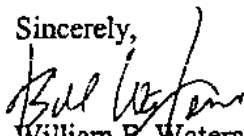
June 3, 2003

Dear Richard,

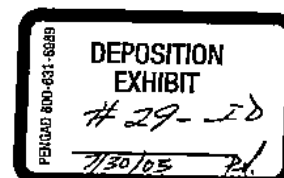
I just read your letter and empathize with your dilemma. Saying that, let me assure you that I am pleased to try to help you mitigate it by confirming herewith in writing that I do indeed remember your lectures and the esteem in which you were held by my criminal justice faculty colleagues and the more astute among our student body. I also recollect asking you to speak in at least one of my classes as an adjunct to my lectures. It was an upper level corrections class titled Treatment of the Offender. As I recall, you responded enthusiastically and positively to my request with an interesting presentation about psychopathy and the Psychopath and the concept of treatment within a corrections context.

I trust that this will help you but if you require more, please ask. I'll do whatever I can.

Sincerely,



William F. Waters
Associate Professor (Retired)





Walter

Education - BA Mich State m.
Psych

Academics - Northern Michigan Univ.

Lecture - d a F S

- Soc. Pol. & Crim Psy - Chicago

- Inter American Forensic
Congress Nov. 4

- American Acad 3 lectures

1st Odont. - 2 general session

Papers -

Qual in Calif - 2 films

Jol Exp - Mich Dist. of Cor.

- two prisons

- duties

- sex offenders

- 400

- info available

- interviews -

J.O. Co. Coroners. Office

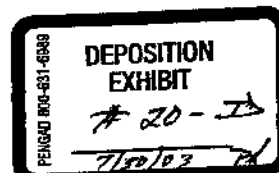
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only copy

The American Journal of Forensic Medicine and Pathology
4(3): 219-221, September
© 1983 Raven Press, New York

Richard D. Walter, M.A.



Anger biting

The hidden impulse*

ABSTRACT Based upon the paralogical reasoning of the anger-impulsive biter, this paper addresses the overload of emotional catharsis which can block a full memory of the biting event and suspend the logical infrastructure of rational behavior. In an effort to overcome these types of investigative difficulties, the paper suggests an approach to resolve dilemma through decompressing the emotional content into path ways of logical understanding. By offering a network of rationale hooks, the perpetrator becomes better equipped to acknowledge the deed.

Vexed by the frustrations of mounting emotional tensions, the perpetrator of the anger-impulsive bite is often attempting to express an assertion of power by attacking a location of vulnerability on the victim. Since the biting behavior is a summary of the perpetrator's quest for gaining dominance through anger and power, the overriding ego involvement appears to be one of "saving face." It is within this context of internal conflicts and emotional reactions that the identity reasoning is flooded and overcome by a paralogical emotional response. Within this context, paralogical reasoning is a discourse that is contrary to the rules of logic and employs arguments of faulty feelings.

Since the aggressor is trying to maintain a position of strength, the biting behavior is often oriented and sieved through the defense mechanisms of acting out, projection, and scapegoating. When the compressed hostility of conflict situation presents itself for resolution, the perpetrator will often dredge up the primitive basic emotions of love, hate, fear, rage; and the unacceptable urges of overloaded internal demands, competitiveness, jealousy, frustration, and ineptitude. To effectuate the vent for rage, it appears that the aggressor must first allow the bank of hostile emotions to generalize into a behavioral storm that overrides the intellectual dynamics of censure and restraint. Given the suspension of logic that controls the person's everyday identity role, the rationale for anger-impulsive biting is established when the unfettered emotional urges are allowed to course down the spillway of rage and reactive aggression.

In responding to the illusions and urges of the paralogical vignette, the anger-impulsive biter will

*on Psychologist, Michigan Intensive Program Center, Michigan Department of Corrections, Marquette, Michigan.
This paper was presented to the AAFS, Odontology Section, the 1983 meetings in Cincinnati, Ohio.

Anger biting

often choose a location site that best symbolizes a feeling of hatred and rejection toward the victim. Once the conflict situation has been abated, the assertion of the intellectual reasoning factors are reestablished and the rationales of the paralogical system are sequestered into a secondary role. Since the gap between the logical and paralogical reasoning creates a hiatus in understanding, the anxiety of the biting behavior often forces the memory of the event into a quasipreconscious level of recognition. For assuaging any feelings of guilt and self-criticism, the perpetrator will often attempt to shunt the responsibility of blaming the victim. That is to say, they will often state, "They caused it."

Based upon the above-described styles of logic, the task of interviewing perpetrators can be a difficult exercise in ascertaining causal reasons that correlate to the physical evidence. Since the perpetrator's logical system is at odds with the paralogical rationales for biting, the stark questions which ask "why and how" will often cause a protective reaction from the interview subject. In realizing that the biting behavior is inconsistent with their identity role, the perpetrator will often attempt to avoid self-revealing quagmires by asserting, "I didn't do it... if I did, I must have been crazy... I was mad... I don't know why."

To avoid the confusion and resistance from the perpetrator to an analytical framework of directed questions, it is often necessary to soften the impact by providing a network of neutral rationale hooks. By so doing, it eases the threat that the perpetrator feels and helps to legitimize the examination of the paralogical rationale system that was used for the infliction of the bite wound. That is to say, by re-creating an excuse system for the anger, the justification system offers greater likelihood that an abstract replay of the events will produce a more accurate account. After the anxiety of the paralogical reasoning has been moderated, the hidden information becomes more accessible for examination in the logical system. Therefore, by the groundwork of saving face for the perpetrator, the probability becomes greater that the perpetrator will reveal the hidden impulses which caused the biting wound. As a byproduct to this approach, the subject will often reveal contextual information, such as: crime style, method of operation, and influences of emotional maturation. The case studies described below illustrate the point.

1. Following a long history of assaultive behaviors toward fellow prisoners and staff, Prisoner A became the target of a fight with two other prisoners in the T.V. dayroom. Although a search of the surroundings revealed a finding of homemade weapons,

an investigation of the incident revealed that Prisoner A was the victim of approximately 35 fist blows to the head and neck region. After the combatants were separated by institutional staff, it is reported that Prisoner A broke free from the officer's restraint and rushed forward to bite combatant B in the face region. Upon examination, it was determined that the bite ripped away the skin between the nostrils and only cartilage was left showing at the wound site. When interviewed by staff, Prisoner A denied that he had bitten combatant B. Upon an interview at a later time, the rationale of two combatants against one, and, the unfair attack to his head, laid the groundwork for explaining the biting behavior. In essence, he indicated that he bit him for reasons of revenge and punishment.

2. While serving a sentence for a murderous sex assault on his girl friend, Prisoner X became involved in a haranguing verbal assault on Prisoner Y. Prisoner Y, who is serving two like sentences for several murders, became enraged by the taunting epitaphs from Prisoner X. Later, when both prisoners were released to the yard area for exercise, Prisoner X continued to annoy Prisoner Y. Although Prisoner Y was significantly superior in physical prowess, he approached Prisoner X and cradled the head in his hands for administering a bite on the cheek. Once Prisoner X had been bitten, Prisoner Y released him to avoid further confrontation. When asked about the fight, Prisoner Y stated, "I was crazy mad, I don't know what I was doing." When interviewed at a later time, he was led through the annoying prologue that Prisoner X had given to him. In addition, it was pointed out to him by myself that Prisoner X had been bitten by other residents. Soon, he was able to abstract that Prisoner X was probably a "professional" victim for bite marks and that the victim had probably "set him up" for a repeat performance. After mulling these thoughts over for a short period of time, he acknowledged that he bit him in anger and wanted to "shut up his yapping mouth." In an afterthought, he indicated that the victim had to pay for bad-mouthing him in front of the other prisoners.

3. After engaging in a fight and being taken to administrative segregation in handcuffs, the prisoner remained in a hostile mood and would not allow the officers to take off the handcuffs. In a short period of time, his anger appeared to be internalized into depressive mood and he claimed that he was going to hang himself. Once suicide prevention measures were implemented, it became necessary to use hand restraints on him. Again, shifting from the depressive state into an active anger, he decided to have the hand restraints removed by further medical atten-

tion. Consider wound into was discovered no further to spend in threats to adjust to it.

As indication of quick location, site of intensification strongly in these type:

In conclusion of anger-increased by the to explain the typical by blocking paralogical translated the behavior the biting greatly en-

Walter

tion. Consequently, he bit and gnawed at $3 \times 1\frac{1}{2}$ in. wound into the center of his hand. When this trauma was discovered, he became cooperative and offered no further resistance. Since this activity appeared to spend his anger-impulsive energies, his suicidal threats stopped and he was able to behaviorally adjust to his environment.

As indicated in the above cases, the administration of quick and "sniper" biting is governed by time, location, situation, and form of anger. The elements of intensity, justification, and immediate reaction strongly influence the motivations and dynamics of these types of biting behaviors.

In conclusion, it is restated that the perpetrator of anger-impulsive biting is often ridden with anxiety by the knowledge of the act without the capacity to explain the "irrational" feelings. Consequently, the typical human protective response is to defend by blocking and denial. However, if the perpetrator's paralogical reasoning can be decompressed and translated into an acceptable self-justification for the behavior, the probability for and admission to the biting behavior and rational explanation is greatly enhanced by the process. □

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Write for reprints to: Richard D. Walter, M.A., Prison Psychologist, Michigan Intensive Program Center, Michigan Department of Corrections, Box 779, Marquette, Michigan 49855.

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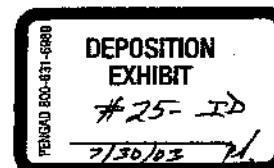
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November 17, 1983

IN REPLY PLEASE REFER TO:

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Mr. Richard Walter
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Post Office Box 779
Marquet, Michigan 49855



Re: Roy Hernandez v. Mazda Motors of America, et al.
LASC Case No. : SW C 48780
Our File No. : 10-2212
- Consolidated With -
Eric David Hernandez v. Roy Hernandez, Mazda
Motors of America, et al.
LASC Case No. : SW C 48766
Our File No. : 10-2212

Dear Mr. Walter:

Transmitted herewith please find a copy of your deposition transcript which was taken on July 8, 1983, as well as a check in the amount of \$450.00.

This letter will serve to confirm our telephone conversation on November 16, 1983, wherein we discussed our need of your services at the time of trial in this matter. We agreed to advance you the amount of \$450.00, which is to be used by you in the event we require you to travel to Los Angeles, California to testify in this matter.

We anticipate the need of your services during the week of December 5, 1983. Of course, we will endeavor to provide you with as much notice as possible.

We wish to thank you for your continued assistance in this matter.

Very truly yours,

Barry R. Schirm
Barry R. Schirm
GRACE, NEUMEYER & OTTO, INC.

BRS:njg
Enclosures as stated.

P.S. Please note enclosed check is for \$500.00, not \$450.00.

1 process. If he has education and knowledge beyond that of
2 a layman, he is an expert; so let's get to it or we'll cut
3 that off at this point.

4 If you want the definition of expert, just read 702.
5 We are not going into his detailed life history at this
6 time.

7 Q Do you specifically learn how to evaluate living
8 Defendants who are facing trials?

9 THE COURT: Don't answer the question. Ask
10 him anything about his education, writings, previous
11 experience, Court testimony, whatever, but that's all.

12 Q You've testified before?

13 A Yes.

14 Q On behalf of whom?

15 A The State of New York.

16 Q How many times?

17 A Once.

18 Q Only one time?

19 A For the State of New York.

20 Q How about any other times?

21 A In the State of California.

22 Q How many times?

23 A I think it's twice; but I'll say once.

24 Q Was that on behalf of the State?

25 A Yes.

1 Q Are there any other States or any other places in the
2 United States that you have testified?

3 A No.

4 Q Now, isn't it true that in your field, psychology --
5 correct -- that's your field?

6 A (No response).

7 Q Is psychology your field?

8 A Yes.

9 Q In that field of psychology, there is much
10 uncertainty and ambiguity?

11 A Yes.

12 Q And are there not over 100 different schools of
13 psychotherapy?

14 A There may be.

15 Q And one of the reasons for that is that no one really
16 knows which methods are more effective than other methods,
17 correct?

18 A That's presumption.

19 Q You do agree there are many different fields and
20 ways to go about psychology, correct?

21 A Yes.

22 Q You just may be one of them; and there is no
23 quantitative way to analyze whether that's a correct field
24 or method?

25 A The quantitative way and the regulation for that is

Index No. J.R. 5667.

(Page 1 of 5)

1 Statement of DR. ERNEST GRIESMER, who is employed in
2 the Forensic Laboratories Division of the Chief Medical
3 Examiner-Coroner's Office for the County of Los Angeles,
4 located at 1104 N. Mission Rd., Los Angeles, California.
5

6 Definitions
7

8 "Medical Examiner's Office" -- used herein refers to the
9 Chief Medical Examiner-Coroner's Office for the County of
10 Los Angeles, California.

11 "Mr. Walter" -- used herein refers to Richard Duane Walter.
12

13 Q. Dr. Griesmer, how long have you been employed at the
14 Medical Examiner's Office?

15 A. 23 YEARS
16

17 Q. Would you please state your current job title or position
18 with the Medical Examiner's Office?

19 A. RETIRED VOLUNTEER (UNSALARIED)
20

21 Q. Did Mr. Walter ever work under your supervision at the
22 Medical Examiner's Office?

23 A. YES
24

25 Q. Do you recall the dates, or approximate dates, that Mr.
26 Walter started and ended his employment with the Medical
Examiner's Office while under your supervision? And if
so, would you state those dates?

A. ABOUT 1980 I THINK 1 YEAR

NSD 800-631-6869

DEPOSITION
EXHIBIT

#43-ID

Index No. J.R. 5667.

(Page 2 of 5)

1 Q. Would you please state your job title or position with
2 the Medical Examiner's Office during the time period that
3 Mr. Walter worked under your supervision?

4 A. SUPREVISING TOXICOLOGIST

5 Q. What was Mr. Walter's job title or position with the
6 Medical Examiner's Office while under your supervision?

7 A. _____

8 Q. To your knowledge, did Mr. Walter's job title or position
9 ever change during his employment with the Medical
10 Examiner's Office?

11 A. NO

12 Q. If the answer to the above was yes, would you please
13 explain what it was changed to, if you know?

14 A. _____

15 Q. Would you please state the number of hours per day, and
16 the days per week that Mr. Walter worked while under your
17 supervision?

18 A. 8 HOURS MONDAY THROUGH FRIDAY

19 Q. Would you please describe the duties or work tasks that
20 Mr. Walter performed while under your supervision?

21 A. HE DID LABORATORY SUPPORT: HE CONTROLL THE IDENTIFICATION AND
22 STORAGE OF SPECIMENS. PREPARED CONTAINERS WITH LABELS AND
23 POWDERS. CLEANED GLASSWARE AND STORED SUPPLIES

24 Q. Did your work with Mr. Walter, or the work he performed
25 under your supervision, generally include inspecting or
26 viewing the cadaver upon which tests would be performed?

Index No. J.R. 5667.

(Page 3 of 5)

1 A. IN TOXICOLOGY HE WAS NOT INVOLVED WITH CADAVERS. HE WORKED SOME TIME
2 IN THE CRIMINALISTICS DIVISION.

3 Q. If the answer to the above is yes, would you explain the
4 procedures involved?

5 A. _____

6 Q. Did your work with Mr. Walter, or the work he did while
7 under your supervision, generally include reviewing the
8 autopsy reports, crime scene photographs, police reports
9 and statements from eyewitness' involving the manner of
10 death of the subject cadaver?

11 A. No

12 Q. If the answer to the above was yes, would you explain the
13 procedures involved? If the answer to the above was no,
14 would you state whether the aforementioned records would
15 generally be available to persons working under your
16 supervision in the laboratory?

17 A. _____

18
19 Q. To your knowledge, did Mr. Walter ever perform work that
20 was psychological in nature while working at the Medical
21 Examiner's Office?

22 A. No

23 Q. To your knowledge, did Mr. Walter ever perform psycho-
24 dynamic analysis of crime scenes or suspects, or use
25 psychology to prepare psychological profiles of crime
26 scenes or suspects of any criminal cases while at the

Index No. J.R. 5667.

(Page 4 of 5)

1 Medical Examiner's Office?

2 A. No

3 Q. To your knowledge, did Mr. Walter ever work in another
4 division or department of the Medical Examiner's Office?

5 A. HE WAS ASSOCIATED AND SPENT TIME WITH THE CRIMINALISTICS DIV.,
6 THEN UNDER DR. RONALD TAYLOR, WHO WAS DEVELOPING CRIMINAL PROCEDURES.

7 Q. If the answer to the above was yes, please state the
8 division or department, if known.

9 A. CRIMINALISTICS.

10 Q. To your knowledge, did Mr. Walter ever appear in court or
11 testify in any court proceeding in connection with his
12 employment with the Medical Examiner's Office?

13 A. No

14 Q. To your knowledge, did Mr. Walter ever give any lectures
15 to police or law enforcement groups while he was working
16 at the Medical Examiner's Office?

17 A. I THINK HE DID . I WAS NOT PRESENT.

18 Q. If the answer to the above was yes, please explain the
19 nature of these lectures, if known.

20 A. _____
21 _____
22 _____

23 (End of Statement)

24 Dated: June 11, 1993
25 Los Angeles, California.

26 Ernest Griesmer P.S.
Ernest Griesmer

Index No. J.R. 5667.

(Page 5 of 5)

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.:
 COUNTY OF LOS ANGELES)

I, Ernest Griesmer, being first duly sworn, depose and say
 as follows:

That I have reviewed the foregoing statement, which I
 have signed and dated on June 11, 1993, and the
 answers I have given therein are true to my own knowledge.

Ernest Griesmer
 Ernest Griesmer

ALL-PURPOSE ACKNOWLEDGMENT

NO 209

State of CALIFORNIACounty of LOS ANGELES

On JUNE 11TH 1993 before me, THOMAS T. BRIGHT NOTARY PUBLIC
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared ERNEST GRIESMER
NAME(S) OF SIGNER(S)

☐ personally known to me - OR - ☒ proved to me on the basis of satisfactory evidence
 to be the person(s) whose name(s) is/are
 subscribed to the within instrument and ac-
 knowledged to me that he/she/they executed
 the same in his/her/their authorized
 capacity(ies), and that by his/her/their
 signature(s) on the instrument the person(s),
 or the entity upon behalf of which the person(s)
 acted, executed the instrument.

Witness my hand and official seal.

Thomas T. Bright
 SIGNATURE OF NOTARY

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ CORPORATE
 OFFICER(S) _____ TITLE(S) _____
☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☐ OTHER: _____

SIGNER IS REPRESENTING:

NAME OF PERSON(S) OR ENTITY(IES)



ATTENTION NOTARY: Although the information requested below is OPTIONAL, it could prevent fraudulent attachment of this certificate to unauthorized document.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

v.

CERTIFICATE OF SERVICE

99-CV-681E

L.A. PORTUONDO,

Respondent.

DAVID GERALD JAY an Attorney at Law, affirms the following, pursuant to the provisions of Fed. R. Civ. P. 43(d), and under the penalties of perjury:

Deponent is not a party to this action, is over the age of 18 years and has an office for the conduct of my business located at 69 Delaware Avenue, Suite 1103, Buffalo, New York 14202. On June 15, 2005, deponent served a copy of the within Memorandum upon the following parties by depositing same in a facility maintained by the United States Postal Service at Buffalo, New York:

HON. MATTHEW J. MURPHY, III
District Attorney of Niagara County
Attn: Thomas H. Brandt, Esq.
Niagara County Courthouse
Park and Hawley Streets
Lockport, New York 14094

Dated: Buffalo, New York
June 15, 2005.



David Gerald Jay

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner

-against-

L. A. PORTUONDO,

Respondent.

Docket No. 99-CV-681E

PETITIONER'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

DAVID GERALD JAY
Attorney for Petitioner
69 Delaware Ave., Suite 1103
Buffalo, New York 14202-3801
Tel: (716) 856-6300

PRELIMINARY STATEMENT

This action was remanded by the Court of Appeals [Drake v. Portuondo, 321 F.3d 338 (2d Cir. 2003)] to allow petitioner discovery and thereafter a hearing on his claim that the prosecutor either knew or should have known that a witness who claimed to be an expert had offered perjured testimony at his criminal trial and that perjured testimony had affected the outcome of that trial.

Attempting to short-circuit any hearing, respondent has once again moved for summary judgment, claiming that there is no necessity for a hearing since all material facts are now clear based upon further research and having had the benefit of discovery himself. He claims that those facts categorically establish beyond all doubt that petitioner is mistaken in his claim for three reasons: 1) there was no perjury in the testimony of the claimed expert witness at his trial, 2) even if there was perjury, the prosecution did not know of it and 3) even if there was perjury, the prosecution had no reason to believe that perjury was afoot. His position is similar to that of the simian trio who see, speak and hear no evil. In his view the prosecutor may present perjured testimony with impunity without fear of retaliation and has found safe harbor under the facts presented in this case.

are material to the determination, summary relief is unavailable to the moving party. The decision must be deferred until the trial develops the facts and their meaning.

DISPUTED MATERIAL FACTS

Credentials of Walter

In order to demonstrate the trial perjury committed by this "expert" witness concerning his credentials, this writer will first examine each claim asserted by him as to the substance of his credentials, contrast his trial testimony with his deposition testimony and then suggest the conclusion to be drawn as to this material issue which has been identified by the Court of Appeals. Drake v. Portuondo, supra at p. 346.

A. Academic Credentials

Trial

Q. Do you teach at all?

A. I'm adjunct lecturer at Northern Michigan University. Record of Trial (hereafter R) p. 784.

Walter Deposition

Q. Yes. Have you ever been an adjunct professor at that institution?

A. Small a, if you mean.

Q. Small a what?

A. As in adjunct, not major a. Deposition (hereafter D) p. 68.

* * *

Q. Is it fair to say that generally speaking that as a rank of professor, as a rank of assistant professor or associate professor, there is a rank of lecturer and then there is a thing called adjunct professor?

A. Yes.

Q. And each one of those are academic ranks, are they not?

A. Yes, with the large a's.

Q. When somebody goes to speak to a class at a school, such as many of us have over the years, at the request of a teacher there?

A. Mm-hmm.

Q. And in this case apparently professor Walter (sic) [Should have been Waters. See Deposition Exhibit 29, annexed here as Exhibit 1] was a teacher at Northern --

A. Michigan University.

Q. -- Michigan University. Okay. The fact that you speak in a class doesn't make you a professor ranked within the University, does it?

A. If I recall correctly, it said, the original testimony said adjunct lecturer. [The testimony above shows that the claim was adjunct professor] I could have, and wish that I had, used the term guest, because it would have confused -- or lessened the confusion, but I used it in the term of a small a. I will admit to being pedantic at times, but I was not referring to large a. It was interpreted to mean large a and that's

what it is. D-70-71.

* * *

THE WITNESS: I see it as a small a. And I said it as a small a. I wished I had said guest. I didn't. D-72.

* * *

Q. Going back to Deposition Exhibit twenty-nine [Exhibit 1 annexed to this memorandum], Professor Waters letter to you of this year. Is it true that you gave presentations to the students in his classes?

A. His and others, yes.

Q. Did that make you an adjunct professor at that school?

A. It made me a small a adjunct professor equal to a guest.

Q. Did that make you and adjunct professor at that school?

* * *

Q. According to the school?

A. If you're talking about large a, no. If you're talking about small a, yes.

Q. All right. The academic faculty of a school had no idea that you were there, other than he asking you to speak to his classes, isn't that so?

A. True.

Q. All right.

A. Also read what he says in there.

Q. Well --

A. Well, he calls it adjunct lecturer.

Q. Does he really?

A. Yes.

Q. Where does he do that? Number twenty-nine?

A. Right.

Q. Is that right?

A. Yes

Q. You translate that, even now, twenty years later to justify using the academic rank of adjunct lecturer, or adjunct professor; is that correct?

A. Wrong. D-72-74.

* * *

Q. You had no control over what the Jury heard, except you uttered the words, adjunct lecturer, correct?

A. Inasmuch as it's part of the english lexicon, I don't apologize for using the word in its proper context. Whether they choose to understand it or not is a misfortune of their's, not mine. I prefer to -- I would have preferred to have said guest. I chose the word adjunct.

Q. Okay.

A. Small a.

Q. Okay. So when you were asked about your teaching qualifications, and that was the import of the question, was it not?

A. I assume so, yes.

Q. Okay. You answered it by saying you gave some guest lectures for this particular professor, correct?

A. Yes.

Q. That was your meaning?

A. Yes.

Q. But you didn't say that, correct?

A. I believed that I did. D-75.

Broderick Deposition

Q. The next topic is qualifications in California, I think?

A. Yes. [Reviewing Deposition Exhibit 14, annexed here as Exhibit 2]

Q. And you have two jurisdictions. Is that two jurisdictions or two juries?

A. It looks like J-U-R-S, but I don't know what that means. It probably -- yes. I would have to say probably qualified in two jurisdictions in California to testify.

* * *

Q. When you prepared him to testify in this case, did you inquire of him as to what area he had been qualified to testify in?

A. I have no recollection of that.

* * *

Q. Do you think it would be important when someone is calling an expert witness to find out what areas of expertise he testified about?

A. I'd answer yes. D. 11-26-03, pp. 18-19.

Argument

When one contrasts the trial testimony with the

deposition testimony, it becomes clear that Mr. Walter still doesn't get it. He persists in believing that when he appeared as a guest lecturer at Northern Michigan University, that he attained the academic rank of adjunct lecturer. Deposition Exhibit 29, annexed here as Exhibit 1, the professor's letter to Mr. Walter in 2003, fails to substantiate his claim of his overstated academic qualifications. His intent was to woo the jury with his credentials and enhance the value of his testimony. His intent at Deposition was to justify his false claim that he had academic qualifications. The answer given at the trial was no surprise to the District Attorney, since his debriefing notes as to Walter's credentials, Deposition Exhibit 14 annexed here as Exhibit 2, shows that the D.A. was also told that he had academic qualifications.

Broderick Deposition

Q. And academic. Northern Michigan University. What was the academic? Was that some kind of an appointment that he had?

A. I can't tell you. I would assume so because I didn't list it under education. I think he did some instructing or teaching.
D. 11-26-03, p. 16.

Since, as the Court of Appeals has observed, the overstating and outright perjury as to Walter's qualifications as an expert are as important to his credibility as his opinion on

the issue of Drake's intent, Walter's proven lack of candor and puffing of his academic credentials which persist to this day goes to the very heart of this case, therefore the record clearly presents a genuine issue as to a material fact.

B. Publications

Trial

Q. Have you written any papers or articles in your field?

A. Yes. R-784.

Broderick Deposition

Q. Now, going down the page on Exhibit 14, you have a topic, papers. Do you know what this is?

A. That would have been dissertations or papers he had written or published.

Q. And then you crossed it out. Does that mean that you inquired of him whether he had been published in some fashion and he indicated that he had not?

A. I think that's a fair assumption, but I can't tell you right now.

Walter Deposition

Q. Okay. Prior to October 19th of 1982, had you published anything in the Journal of the American Academy of Forensic Sciences?

A. No. D-34.

* * *

Q. You said you delivered an address concerning the topic [bite marks] but hadn't actually written the paper yet?

A. I had not published the paper. I had written it not published it.

Q. Okay. And you believe you delivered it at a January meeting, did you say?

A. No. February.

Q. February meeting?

A. Yes

Q. Which would have been when, what year, if the testimony at the trial --

A. In '81.

Q. -- was 1982 October?

A. Oh, it would have been '82 then.
D-42-43.

Argument

The fact of the matter is that Mr. Walter was totally unpublished in October, 1982. Annexed hereto is Deposition Exhibit 20, marked here as Exhibit 3. This is the article described by Mr. Walter in his deposition testimony, which article was presented to the American Academy of Forensic Sciences in 1983 and finally published in the year 1985, long after his testimony in the Drake case. District Attorney Broderick appears to have been given the correct answer to his query as to publications in prepping Mr. Walter for his testimony;

however, even though he crossed the topic off his list, he still asked the question at trial. Although Walter probably told the D.A. that he was then unpublished, he lied when asked the question, claiming that he had written articles and papers in his field, an answer the D.A. knew was untrue.

C. Testimony as an Expert

Q. Have you ever been qualified to testify as an expert witness in any criminal court?

A. Yes.

Q. And in what states and jurisdictions, if you would please.

A. In California, Los Angeles County and in Pasadena. R-785.

Deposition

Q. Yes sir. Line nine. Have you ever been qualified to testify as an expert witness in any criminal Court?

A. What page?

Q. Seven eighty-five.?

A. Oh, seven eighty-five. I'm sorry.

Q. Yes sir. You answered yes. Where had you been qualified to testify as an expert witness in a criminal Court in 1982 before October 17th -- or October 22nd, pardon me?

A. That's what we were talking about earlier. I said in Pasadena, not as an expert in psychology. It was the expert on the chain of evidence on that particular case.

Q. But sir, when a chain of evidence person testifies, they're not testifying as an expert, are they?

A. I believe they were.

Q. You believe they are?

A. Yeah. D-84-85.

* * *

Q. Tell me, do you have a recollection of testifying in California?

A. Yes.

Q. All right. What was the name of the case, if you can remember?

A. That's what I've been trying to find.

Q. Can't remember?

A. Right.

Q. But you testified on the evidence going into the lab, checking it out, and then bringing it to the Court?

A. It was a little more complicated than that, but in essence, yes.

Q. That was one case. Then you had to testify in some other case, is that so?

A. The Mazda one. D-86. [See Deposition Exhibit 25, annexed here at Exhibit 4, which notes that the so-called "Mazda" case, a civil matter, was still in deposition stage in 1983, demonstrating that Mr. Walter could not have testified in Court as an expert in that matter prior to his trial testimony in this case on October 22, 1982].

* * *

Q. It's your present recollection you testified in one about the chain of evidence?

A. Yes.

Q. Isn't it true, sir, that you were giving the impression that you had testified in homicide cases?

A. No, I don't think so. D-87.

* * *

Q. But your recollection of testifying in a homicide case, only once, and it concerned the chain of evidence?

A. Right. My part. D-87-88.

During Mr. Walter's deposition, his attention was directed to various documents, including testimony he had given in a homicide case tried in 1987 in the State of Ohio. The pertinent testimony from that exhibit, marked at his deposition as Exhibit 24, the pertinent pages reproduced here as Exhibit 5, illustrate his proclivity of fudging his qualifications. He gives the impression that his California testimony was as an expert psychological profiler, failing to point out that his testimony was in one case to show the chain of evidence (hardly expert testimony) and the fact that the other case (Hernandez v. Mazda) was a civil matter.

Testimony in State v. Haynes

Q. You've testified before?

A. Yes.

Q. On behalf of whom?

A. The State of New York?

Q. How many times?

A. Once

Q. Only one time?

A. For the State of New York.

Q. How about any other times?

A. In the State of California.

Q. How many times?

A. I think it's twice; but I'll say once.

Q. Was that on behalf of the State?

A. Yes.

* * *

Q. Is psychology your field?

A. Yes.

One other area of Mr. Walter's deposition testimony on this topic of prior testimony as an expert deserves mention. When he is examined on the effect his testimony on his qualifications might have had on the Ohio jury, the following sequence develops:

Q. Was the next question asked of you, how many time have you testified totally?
Answer, in murder trials, three times?

A. That's an error.

Q. Well, it's not an error, is it, because you did testify in California in, as you

recollected, murder trials?

A. Right.

Q. Correct. But you testified in California as to the chain of evidence?

A. Right.

Q. So it didn't have anything to do with your expertise as a profiler, correct?

A. Exactly.

Q. All right. And when you said that -- strike that. When you gave the answer did you mean to give the impression to the Jury, in Haynes, that you had testified along similar lines on similar topics --

A. No.

Q. when you testified in the murder trials?

A. No.

Q. But you didn't expand your answer?

A. I wasn't asked.

Q. Mm-hmm. You knew what they were asking you, didn't you?

MR. BRANDT: Object to the form.

THE WITNESS: I was simply answering the question. D-29-30.

* * *

Q. I understand. But when you told the Jury in Haynes, on page one thirty-seven, how many times have you testified totally in murder trials, three times. And on whose behalf. Two or three times, I don't remember. Always on the part of the State. The State had nothing to do with Hernandez against Mazda Motors, did it?

A. I was working for the County at the time.

D-33.

Argument

This witness must be seen by the trier of fact. Looking at the cold record does not do him justice. His rendition of his career as a person who has been qualified as an expert is full of holes, when the true facts are revealed. He may have testified in a homicide case in California, but his testimony was as a custodian of evidence and not as a profiler; but it is his role as a profiler that he seeks to prop up with phony qualifications. His deposition testimony can be characterized as almost wholly evasive. He seeks to justify his trial testimony in this case by blaming others. They didn't ask the right question. I said one thing but meant another. People don't understand me. He is the type of witness who would have a right to claim that he went to Harvard Law School because he was once in Cambridge, Massachusetts and walked onto the campus. His perjury has caused petitioner no end of damage which must be set aright.

The District Attorney's presentation of Walter as an expert permitted the witness to expand his role to its zenith although the District Attorney's notes and recollections show little support for the thorough preparation such an expert

deserves. Mr. Broderick took him at face value, didn't care much for his background, didn't inquire as a good trial lawyer would and should do and permitted the witness to run amok.

D. California Training

Mr. Walter did in fact work in the L.A. County Coroner's Office for approximately 2½ years from December 30, 1975 through April 21, 1978. He was a student at California State at the time but never finished his course work for the terminal degree of Ph.D. During his tenure in that position, he was basically a laboratory technician. See Deposition Exhibit 43, herein marked Exhibit 6, affidavit of Ernest Griesmer, Walter's supervisor, dated June 11, 1993.

Trial

Q. How many coroner's cases arose while you were there in the Los Angeles County Medical Examiner's office?

A. Approximately 40,000.

Q. How many of those cases did you have anything to do with yourself?

A. Between 7500 to 10,000.

Q. When you say that, you didn't handle those cases yourself, did you?

A. No. I had personal involvement with at least five to five thousand to seventy-five hundred of some capacity in terms of investigation.

Q. And that would be advisory?

A. Right.

Q. How many of those cases could you estimate for us in just a ball park figure would be homicide, that is murder or manslaughter cases?

A. The best estimate would be about five thousand. D-789-790.

* * *

Q. And as I understand it then you would prepare the profile? [After study of police reports, crime scene photographs, autopsy findings, lab results, witness statements, view of the victim, consult with pathologists and review other evidence]

A. Right.

Q. And what was the purpose of the profile you were preparing?

A. The profile was not only to help the pathologist and the investigating agencies figure out what happened, but also then towards leads in resolving the case, whether it was a complicated case in terms of understanding the motive behind what occurred. And sometimes that's very complex, so they would take the aid of the profile.

Q. Is this a generally accepted method of approach in your field of psychology?

A. Yes.

Q. In particular forensic psychology?

A. Right. R-791.

Deposition

Q. Now, were you a full-time person working there while you were going to school?

A. Yes. Yes.

Q. So you had a full-time academic load?

A. Sure,

Q. Plus full-time working in the lab?

A. Sure

Q. What was the general duties in the lab, what were you doing?

A. The criminal duties, um --

Q. I don't care about the formal duties. Tell me what you did?

A. What I did? I was hired to and I did --

Q. I don't care what you were hired to do. Just tell me what you did?

A. What I did was I worked up in the lab as a student professional worker.

Q. I don't care what your title was. Tell me what you did, sir?

A. And I did the grunt work in addition to that.

Q. Stop. What drug work did you do?

A. Grunt.

Q. Grunt? What is grunt work?

A. Work that no one else wants to do.

Q. Such as?

A. Low level. Such as, as alleged in part of this, in terms of filling the bottles and in terms of getting the samples, in terms of whatever students do, whatever the boss needed to have done. D-91-92.

* * *

Q. My question is; who was asking for your opinion?

A. The pathologist on that particular case.

Q. The pathologist?

A. Yes.

Q. A physician?

A. Yes.

Q. I see. Okay. Did the detectives ask you what your opinions were of your findings?

A. On that particular case?

Q. On any case?

A. Sure.

Q. Okay. Did you ever generate any kind of written report to go into the criminal file as to what your findings were?

A. No.

Q. Anybody ever rely on any opinions that you had in prosecuting any case?

A. I don't know. D-96-97.

I will leave to the Court to review the additional pages of Mr. Walter's deposition testimony which underscore the thesis that when he was cleaning laboratory equipment and doing grunt work at the Los Angeles Coroner's Department he simply later fantasized that he was more important than he was. The true state of facts is aptly illustrated in the following passage:

Q. All right. And when the Court [the Second Circuit] says, you over blew -- you over claiming extensive experience in psychological profiling, what was it you were doing for the L.A. Coroner's Officer, Medical Examiner's Office, that constituted psychological profiling?

A. Okay.

Q. What were you doing?

A. Good question.

Q. It's the only question. D-36.

Broderick Deposition

Q. Tell us, right off the top of your head, what those numbers were?

A. It was extraordinary. It was like upwards of ten thousand matters that he had done for the L.A. County Medical Examiner's Office.

Q. Did he tell you what matters he had done for them?

A. He just said he did profiling for unsolved or uncharged crimes. He would give police officers an idea of who they were looking for.

Q. Did you ask him to give you any reference as to who might attest to this extraordinary amount of profiles, ten thousand?

MR. BRANDT: Form.

THE WITNESS: Did I ask him?

BY MR. JAY:

Q. Yes.

A. For references?

Q. Yes.

A. From the L.A. County? No, I didn't.

* * *

Q. Did it seem to you that ten thousand profiles was an extraordinary amount of profiles?

A. Well, now that I look at it, it seems like an extraordinary number. Broderick 8-21-03, pp. 41-42.

Argument

Record evidence demonstrates that the claims of lab rat Walter at the coroner's office to have been overstated and misleading so that the jury would view him as a very able expert who had a lifetime of experience as a profiler, when in fact he was at most a technician in a forensic laboratory.

The prosecutor presented this witness with his overblown sense of self-importance to a gullible jury who fell for his theory hook, line and sinker. To say that a bell should have rung in the prosecutor's head telling him that this witness was a fraud puts his responsibility mildly. The D.A. needed to shore up his belief that the shooting was not accidental but very much intentional. The witness was spoken to by the D.A. for almost one hour at least two weeks before he was used at the trial (Broderick Deposition 8/21/03 at pp. 36-37). His use as a witness was not a last minute desperation move. The D.A. neglected to find out anything about Mr. Walter, had no C.V.,

asked for no references and frankly, he didn't want to know. When the Court of Appeals points to the standard "knew or should have known", the D.A.'s lack of interest in the qualifications of his witness suggests that "don't ask, don't tell" was the watchword of the day.

Prison Psychologist

Trial

Q. Mr. Walter, your present or current occupation?

A. I'm a prison psychologist. R-783.

Deposition

Q. Now, it's my understanding that [in Michigan] there are four categories of civil service ranks of psychologists; is that correct, at that time?

A. Right.

Q. What is a limited license?

A. Limited is for those persons with a Master's degree.

Q. All right. And the full license?

A. Is PHD's, with having their internship and whatever else, yes.

* * *

Q. As a limited psychologist, that they have to work under the supervision of certain types of qualified persons --

A. Except --

Q. -- in order to do that work, isn't that so?

A. Except in the opinion of the Attorney General Frank Kelly, written in '79, which I have here, then says, these limitations do not apply to duties performed as an employee of the governmental entity or nonprofit organization serving as benevolent and charitable services.

Q. It doesn't give any special rank to call yourself a psychologist when you're going to testify anywhere, does it?

A. He also addresses that we can call, we could call ourself psychologist within that setting.

Q. That setting was within the Michigan Department of Corrections, correct?

A. Or within a governmental agency.

Q. And your testimony to someone, such as a District Attorney of Niagara County in the State of New York, did not give you the power to call yourself a psychologist under that limited licensure that you had in Michigan, isn't that so?

A. I don't know. D-80-81.

* * *

Q. Did you tell Mr. Broderick or anyone in the D.A.'s staff anything about the limitations of your licensure?

A. I'm tempted to say yes. In fact I can't recall specifically, so I don't know.

Q. Why would you be tempted to say yes? Is it your custom to let people know, who are contacting you to testify in foreign places, foreign states, such as New York, of this limitation?

A. Sure. D-81-82.

Broderick Deposition

Q. Now, at that time did you know what a prison psychologist is in the Michigan system?

A. Did I know what they were?

Q. Yes. Did you know what the job description was?

A. I didn't know anything about the Michigan system or the New York system or any other system as to what they did. I assume what they did. * * * Broderick deposition of 11/26/03 at p. 22.

On the one hand, the witness Walter was fairly certain that he pointed out the meaning of the term "prison psychologist" to the District Attorney, which in Michigan does not mean a psychologist who works in a prison, but a person whose license limits them to provide services only in an governmental institutional setting under strict supervision by a fully licensed Ph.D. Psychologist. On the other hand, the D.A. claims to be totally unaware of the distinctions between the various forms of limited- and fully-licensed psychologists in Michigan. Whichever is the truth, the jury in this case was entitled to know it, so that its evaluation of Walter's testimony could be made with knowledge, rather than being bamboozled by the term "prison psychologist".

D.A.'s Responsibility

This memorandum has pointed out various portions of the testimony, both trial and deposition, which bear upon the issue of whether or not the D.A. had knowledge of Walter's perjury, or, whether or not the D.A. should have know of his deficiencies, given the facts before him.

The D.A. has admitted that he believed the sole issue in the case was the intent of Drake when he discharged the weapon into the car. His whole purpose in presenting Mr. Walter was to shore up what he viewed as a deficiency in his case as to the intent of the perpetrator. R-750, Broderick Deposition 8/21/03 at p. 15.

Drake urges that he has proved and will continue to be able to prove that the D.A.'s actions taken pre-trial and during the trial show his true motive in proffering Mr. Walter as an expert witness on the subject of picquerism.

Qualifications

The D.A. was first made aware of the existence of Mr. Walter by Dr. Levine, also a witness in the case. On October 7, 1982, after several calls back and forth to Michigan, the D.A.

had a 52 minute conversation with Mr. Walter concerning his engagement as an expert witness in the case. Broderick Deposition 8/21/03 at p. 37. This conversation was two weeks before testimony was heard in the case. He recalls that Walter sent him literature concerning the syndrome and that he used those materials to school himself. Broderick Deposition 8/21/03 at p. 44-47.

Presumably, the qualifications of the expert were discussed during this call, but no effort was every made to secure his Curriculum Vitae. Further, no attempt was made by the D.A. to corroborate the qualifications of the witness:

Q. Other than talking to the man and getting him referred to you by Dr. Levine, did you make one phone call to anybody to checkup on this guy?

A. No.

Q. Did you write a letter to anyone?

A. No. I never met him until the night before he testified.

Q. I understand. Did you have anybody on your staff either write or send a letter to anyone to see about his qualifications?

A. No, I didn't. I didn't make any decision about presenting his testimony until I met him and talked to him.

* * *

Q. So he sold you on his credentials and his capability to talk reasonably about this

topic?

A. Right, and the book. Broderick
Deposition 11/26/03 at pp. 30-13.

Walter does not remember bringing a C.V. with him for the D.A.'s use (Deposition 165) but has stated that it was his custom to do so. Broderick doesn't believe he either requested or received a C.V., Deposition 8/21/03 at p. 11, but a Walter C.V. was found in the D.A.'s Drake file, a C.V. which could not possibly have been received in 1982, since it speaks of qualifications post-dating the trial at issue. Deposition 8-21-03 at p. 24.

It is suggested that the D.A. was uninterested in Mr. Walter's qualifications as long as his opinion supported his theory of the case on the issue of intent.

The Request for a Continuance

When the testimonial part of the trial began on Tuesday, October 19, 1982, the Presiding Judge made it clear in no uncertain terms that the trial had to be completed expeditiously due to the Court's commitments, and in no event later than Tuesday, October 26. R. 9-11.

This schedule was underscored when the following

chambers discussion was recorded on Monday, October 25:

MR. BRODERICK: Do we have a time table on when we're going to the jury?

THE COURT: Depends. I don't know what's going to happen. I know if you have rebuttal. I'm at a loss. I want to have at least, at least your summations in today. That's for sure. I don't give a damn. That's going to be done. If necessary I'll charge tomorrow morning. I want to get it over today. Depending on what's happening, I want to go to the jury today. R. 952-953.

It had become apparent that counsel for the defendant were caught by surprise by Mr. Walter's picquerism testimony, it being first described to them in chambers by the District Attorney, shortly before Walter took the witness stand on Friday, October 22, 1982 (R. 745-750), they scurried around over the weekend and on Monday, October 25, in the same chambers meeting noted above, requested a continuance based upon their representation that they had contacted both a psychiatrist and a psychologist over the weekend, reporting that those mental health professionals were unaware of picquerism.

It was no surprise to the District Attorney that the defense was caught flat-footed, because he had never heard of the claimed syndrome either until it was revealed by Mr. Walter in a post-October 7 telephone call:

[H]e called me back and he said, I think what you have is a picquerism. And my response to that was, what the hell is picquerism, because I had never heard of that term before. Broderick Deposition 8/21/03 at p. 44.

What is surprising is that the D.A. not only failed to support the defense in their request for a continuance, but, the unkindest cut of all was the fact that he emphasized their failure to controvert the picquerism testimony in his summation:

You didn't hear anybody else come in here and tell you. picquerism isn't a real thing. It isn't a valid psychological profile. Nobody said that. R. 1083.

In that moment, the District Attorney forgot that his first duty is to do justice, not secure convictions at all costs. This remark goes to the heart of his mission to deprive Drake of a fair trial and speaks volumes as to his complicity in producing Walter as a witness, a man whose credentials were suspect from the start. Due process was brought to a new low that day. Any reasonable attorney, it is urged, would have insisted upon some verification of those incredible credentials before presenting them willy nilly to a jury in a murder case. The D. A. chose not to do so, sealing Drake's fate.

Conclusion

As stated at the outset, the conduct of the District Attorney resulted in the perpetration of a fraud upon the Court. Drake's jury was poisoned by the testimony of a charlatan. Not only did Walter commit perjury, the District Attorney allowed it to happen and capitalized upon its admission. To close one's eyes to wild claims of knowledge by a witness is to fail justice.

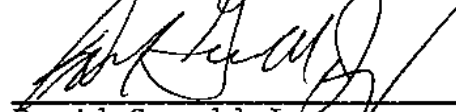
Drake was denied due process since the conviction rests, in part, upon perjured testimony. He was denied the ability to effectively examine witness Walter implicating his rights under the Sixth Amendment. The record evidence supports Drake's claims.

The summary judgment motion should be denied in all respects and this matter scheduled for a testimonial hearing as suggested by the Court of Appeals.

Dated: Buffalo, New York
June 15, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329,
Petitioner,

99-CV-0681E(Sr)

-vs-

MEMORANDUM

L.A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility,
Respondent.

and

ORDER¹

INTRODUCTION

On October 25, 1982 Petitioner Robie J. Drake ("Drake") was convicted after a jury trial in Niagara County Supreme Court of two counts of second degree murder for the deaths of Stephen Rosenthal and Amy Smith. He was sentenced to two consecutive terms of twenty years to life imprisonment. After various appeals, Drake filed a petition for a writ of habeas corpus with this Court alleging, *inter alia*, that his Fourteenth Amendment right to Due Process had been violated when the prosecution introduced — without prior notice to the defense — expert testimony that Drake's crimes were motivated by a psychological pathology known as "picquerism." Drake alleged that he should have been granted a continuance in order to better attempt to counter such evidence, that the expert committed perjury at trial and that the prosecution knew or should have known of the perjury.

¹This decision may be cited in whole or in any part.

BACKGROUND

By Decision and Order dated March 16, 2001 this Court adopted the Report and Recommendation of Magistrate Judge H. Kenneth Schroeder wherein he concluded that the petition should be denied. Drake appealed to the United States Court of Appeals for the Second Circuit which held, in a decision issued on January 31, 2003, that the testimony of the prosecution's expert witness was false in some respects and could be considered perjurious. *See Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2003). The Second Circuit remanded the action to this Court for further development of the record and for a determination as to whether the prosecution knew or should have known that the expert witness had perjured himself at trial.

This Court scheduled an evidentiary hearing for June 27, 2003 which was subsequently adjourned in order to allow Drake's newly-appointed counsel an opportunity to familiarize himself with the case and to prepare for the hearing. Thereafter, the parties determined to take the depositions of the relevant witnesses prior to any hearing. The parties deposed the prosecutor Peter Broderick, now a Niagara County Court Judge, and Richard Walter, the expert witness. After completing that discovery, rather than reschedule the evidentiary hearing, the Court granted Respondent's request to file a Motion for Summary Judgment.

On September 30, 2004 Respondent filed the Motion for Summary Judgment in which it argued that Walter did not commit perjury at trial and that, even if the Court concludes that he did commit perjury, the prosecutor neither knew nor should have known of the perjury. On June 15, 2005 Drake filed a response to the Motion. The Court received Respondent's reply on June 21, 2005 and oral argument on the Motion was heard on June 24, 2005.

DISCUSSION

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Naupe v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted). Such holds true even if the false evidence or false testimony relates only to the credibility of a witness. *Ibid*.

If the prosecution knew or should have known that its case included perjured testimony, then the conviction must be set aside if there is any reasonable likelihood that the false statement could have affected the judgment of the jury. See *United States v. Agurs*, 427 U.S. 97, 103-04 (1976) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). If the prosecution was unaware, however, relief should be granted only if "the testimony was material and 'the court is left with a firm belief that but for the perjured testimony, the defendant most likely would not have been convicted.'" *Ortega v. Duncan*, 333 F.3d 102, 108

(2d Cir. 2003) (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)).

Such an inquiry entails a determination as to “whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government’s case but also upon the credibility of the government’s witness.”

United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975).

A. Walter’s Trial Testimony

Drake asserts that Walter committed perjury at trial by testifying falsely concerning his qualifications as an expert and concerning his prior work experience. Specifically, Drake challenges Walter’s statements as to his work history with the Los Angeles County Medical Examiner’s Office², his licensure as a psychologist, his prior scholarly publications, his teaching experience and his prior testimony as an expert witness. In its January 31, 2003 decision, the Second Circuit concluded that Walter had testified falsely. The Court stated:

“He claimed extensive experience in the field of psychological profiling, including work on 5000 to 7500 cases over several years in the Los Angeles County Medical Examiner’s Office, an adjunct professorship at Northern Michigan University; more than four years as a prison psychologist with the Michigan Department of Corrections; and expert testimony given at hundreds of criminal trials in Los Angeles and Michigan.”

Drake, 321 F.3d at 342.

² In portions of the record, this entity is also referred to as the Los Angeles County Coroner’s Office.

Ordinarily, in light of such a statement by the Second Circuit, Walter's perjury would be presumed. However, Respondent urges the Court to review Walter's trial testimony because it asserts that much of Walter's testimony was true and that — even if portions of Walter's testimony were factually incorrect — Walter did not intentionally testify falsely and thus the incorrect testimony does not constitute perjury under the law. Respondent's argument misses the point that a conviction knowingly based on *false evidence*, even that which does not rise to the level of perjury, is subject to reversal. See *Thomas v. Kuhlman*, 255 F. Supp.2d 99, 108 (E.D.N.Y. 2003) (citing *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995)). On the other hand, perjury is defined as "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). Because Respondent argues, in part, that Walter's trial testimony was not false, the Court will examine each of the challenged areas of Walter's trial testimony in turn.

1. Licensure

Drake takes issue with Walter's characterization of his occupation at the time of the trial as a "prison psychologist" for the Michigan Department of Corrections. Drake asserts that such statement is false because, under Michigan law, a psychologist must possess a Ph. D. Drake contends that, as Walter had

obtained only a Master's Degree, his license was only that of a "limited psychologist."

Walter testified at trial that he held a Master's Degree only and that he was a "prison psychologist." Trans. at 783.³ On cross-examination Walter confirmed that he did not possess a Ph. D. Trans. at 805. At his deposition in this case, Walter defended his use of the title "prison psychologist." Walter stated that, in Michigan, one with a Master's Degree may receive a limited license in psychology. Walter Dep. at 80. Ordinarily, one with a limited license must work under the direction of a fully licensed psychologist. *Id.* at 80-81. Walter testified, however, that the Michigan Attorney General in a 1979 Opinion stated that there is no requirement for such supervision when the limited psychologist works for a governmental entity or non-profit organization. *Ibid.* Based on that same Opinion, Walter testified that limited psychologists are permitted to use the title "psychologist" within such settings. Walter Dep. at 80-81.

This Court cannot conclude that Walter misrepresented his qualifications when he testified at trial that he held only a Master's Degree and clearly stated that he did not possess a Ph. D.; nor can the Court conclude that Walter testified

³ References to "Trans." are to the Trial Transcript.

falsely when he characterized his then-current occupation as that of “prison psychologist.”⁴

2. Publications

Drake next asserts that Walter testified falsely concerning his prior publications. At trial, Walter was asked if he had *written* any papers. He responded “Yes.” Trans. at 784. At his deposition, Walter reiterated — albeit with some confusion as to the relevant dates — that he had written a paper prior to the Drake trial, but that it was presented and published *after* the trial. He stated:

“Q: Okay. Prior to October 19th of 1982, had you published anything in the Journal of the American Academy of Forensic Sciences?

“A: No.”

Walter Dep. at 34.

“Q: You said you delivered an address concerning the topic [of the paper] but hadn’t actually written the paper yet?

“A: I had not published the paper. I had written it not published it.

“Q: Okay. And you believe that you delivered it at a January meeting, did you say?

“A: No, February.

⁴ The Michigan Department of Corrections recently listed an available position for a “psychologist.” Linked to that listing is a copy of the Civil Service job description. That description states that an applicant for the position of “psychologist” must possess a Master’s Degree in Psychology. See www.michigan.gov/documents/Psychologist_12904_7.pdf. The job description states that “[e]mployees in this job complete or oversee a variety of professional assignments to provide psychological treatment to residents of state facilities and community-based programs. Positions in this class are located in mental health facilities, prisons, youth residential facilities, and veterans hospitals.” *Ibid*.

"Q: February meeting?
"A: Yes.
"Q: Which would have been when, what year, if the testimony you gave in the trial - -
"A: In '81.
"Q: - - was in 1982 October?
"A: Oh, it would have been '82 then."

Walter Dep. at 42-43.

The Court concludes that Walter did not testify falsely at trial when he testified only that he had written a paper prior to his testimony. As Walter never testified at trial that said paper was published, any inconsistency in his deposition testimony regarding the dates of the presentation and publication of that paper is irrelevant.⁵

3. Teaching Experience

Drake also asserts that Walter testified falsely that he was an "adjunct lecturer" at Northern Michigan University. Drake argues that the term "adjunct lecturer" is an academic title that Drake was not entitled to use and that left a false impression with the jury.

At trial, Walter was asked "Do you teach at all?" Trans. at 784. In response, he stated "I'm adjunct lecturer at Northern Michigan University." *Ibid.*

⁵ Exhibit 3 to Drake's Memorandum in Opposition to this Motion is a copy of an article entitled "Anger biting" which was published in the September 1985 issue of the *American Journal of Forensic Medicine and Pathology*. The publication contains a notation that the paper was first presented to the Odontology Section of the American Academy of Forensic Sciences in February 1983.

At his deposition, however, he elaborated on the nature of his relationship with that institution — to wit, he had lectured as a guest of a professor at Northern Michigan University. Walter Dep. at 68-71.

Walter defended his use of the term “adjunct” as factually correct within its ordinary meaning because he meant adjunct with a lowercase a, not a capital A. Walter Dep. at 68, 72. Although he wished he had used the term “guest,” Walter disputed that the jury could have been misled by his testimony at trial. He stated:

“Inasmuch as its [*sic*] part of the english lexicon, I don’t apologize for using the word in its proper context. Whether [the jury] choose [*sic*] to understand it or not is a misfortune of their’s, not mine. I prefer to — I would have preferred to have said guest. I used the word adjunct.”

Walter Dep. at 75.

While this Court is dismayed at the cavalier attitude displayed by Walter, it cannot conclude that Walter’s use of the term “adjunct” rendered his testimony false as a matter of definition. The word adjunct is defined as “a person associated with or assisting another in some duty or service.” Webster’s Third New International Dictionary 27 (1965). In the context in which the question was asked, however, Walter’s response was — at best — misleading.⁶

⁶ Neither party addressed the significance, if any, of Walter’s use of the present tense. Walter stated, “I’m adjunct lecturer ***.” No evidence was adduced as to whether — at the time of trial — Walter continued to lecture as a guest at that institution. His response, (continued...)

4. Experience as an Expert Witness

Drake further argues that Walter's trial testimony was false with respect to his prior experience testifying as an expert witness. The Second Circuit agreed, noting that Walter claimed to have testified in "hundreds of criminal trials in Los Angeles and Michigan." *Drake*, 321 F.3d at 342. The Court must first note that the Second Circuit's characterization of Walter's trial testimony is incorrect. Walter never claimed to have testified at hundreds of trials. Rather, he claimed to have been qualified in one or two jurisdictions. Walter was never asked how many times he had been so qualified.

"Q: Have you ever been qualified to testify as an expert witness in any criminal court?

"A: Yes.

"Q: And in what states and jurisdictions, if you would please.

"A: In California, Los Angeles County and in Pasadena."

Trans. at 785. Notwithstanding the fact that Walter did not claim to have testified hundreds of times, there is no doubt that even his actual — more limited — trial testimony was factually incorrect and thus, false.

At his deposition, Walter reiterated his prior experience as an expert witness. He could recall testifying only in two prior cases, one murder case and the "Mazda" case. When questioned about the substance of his prior expert testimony, however, Walter revealed that he testified in the murder case in his

⁶(...continued)
however, left the impression that his affiliation with that institution was ongoing.

capacity of the custodian of the evidence — a chain of custody matter — not as a psychological expert. Walter Dep. at 87-88. Walter defended his characterization of his testimony as “expert” because he believed that such testimony was in fact expert testimony. *Ibid*. The second matter in which Walter could recall testifying prior to the Drake trial was the “Mazda” case — a civil, not a criminal, case. Thus, his testimony in that case was not relevant to the prosecutor’s question at trial which specified qualification as an expert in any *criminal* court.

Although Drake has demonstrated that Walter’s testimony at trial was factually incorrect, and thus false, he has not shown that Walter gave such false testimony intentionally. However, as discussed above, the relevant issue is whether Walter’s trial testimony concerning his qualifications was false. Accordingly, the Court concludes that portions of Walter’s testimony concerning his past qualification as an expert witness were false.

5. Los Angeles County Medical Examiner’s Office

Finally, the area of most concern is Walter’s trial testimony relative to his work experience in the Los Angeles County Medical Examiner’s Office. At the beginning of his testimony on direct examination on this topic, Walter testified that he was:

“a student professional worker at the time, while I was taking an academic course work in criminal justice. While I was there I

consulted with the prosecutors, the police agencies and various investigative agencies. I related to and the pathologists related to moding cause of death and profiling for possible leads."

Trans. at 788-89. Walter testified that, in his position, he had personal involvement in 5,000 to 7,500 cases. Trans. at 789-790. He testified that, in some cases, he would view the decedent's body, confer with pathologists and others, discuss the case with police and investigators and develop a "profile." Trans. at 791. He testified that the purpose of a profile:

"was not only to help the pathologists and the investigating agencies figure out what happened, but also then towards leads in resolving the case, whether it was a completed case or understanding the motive behind what occurred. And sometimes that's very complex, so they would take the aid of the profile."

Trans. at 791.

What is problematic about Walter's testimony is that, while he may have engaged in such tasks as he described at trial, he was not employed to engage in those tasks. In fact, his employment was for the purpose of working in and maintaining the toxicology laboratory. There is no evidence to suggest that Walter engaged in profiling activities at the behest of the Medical Examiner's Office. To the contrary, there is evidence in the record to suggest that, when the Medical Examiner's Office required profiling, it was conducted by the Medical Examiner himself.⁷ An affidavit submitted by Dr. Ernest Griesemer, who worked

⁷ Attached as an exhibit to Drake's Objections to the Report and Recommendation issued
(continued...)

with Walter at the Medical Examiner's Office, indicates that Walter's primary responsibility was to maintain the laboratories at the Medical Examiner's Office.

See Drake's Opp'n Mem. at Ex. 6.

In an effort to demonstrate that Walter was more than a mere student assistant, Respondent points to another letter written by Dr. Griesemer to the Ethics Committee of the American Academy of Forensic Sciences in October 1995.

See Resp't's Summ. J. Mot. at Ex. A. Griesemer's letter states in part:

"Richard Walter worked in the Forensic Sciences Laboratories of the Department of Coroner, Los Angeles County, Los Angeles, California for two and a half years from 1/76 to 8/78. He was employed as a Student Professional Worker and worked with Forensic Sciences, Toxicology and Histopathology Laboratories and their storage.

* * * * *

"While he was working here, I noted that Mr. Walter would read through as many of these report and review items as he could and he was continually discussing cases with Coroner's staff members,

⁷(...continued)

by Magistrate Judge Schroeder is a sworn statement from Dr. Ronald Taylor who from 1973 to 1981 was the Director of the Forensic Science Laboratory for the Los Angeles County Medical Examiner's Office. The statement is in the form of Taylor's answers to written interrogatories. A portion of the statement contains the following questions and answers:

- "Q: In the course of your employment with the Medical Examiner's Office, did you and/or the [Forensic Science Laboratory] ever prepare psychological profiles, or utilize psychological modeling, or otherwise employ behavioral science to create a composite of a suspect in a criminal case?
- "A: No, but the Medical Examiner himself did.
- "Q: If the answer to the above was yes, please explain[.]
- "A: In certain high profile cases, the medical examiner — Dr. Noguchi [sic]— would have a psychological profile drawn of a yet to be identified murderer. To my knowledge, he never used his own staff."

Statement of Dr. Ronald Taylor, attached to Drake's Objections to the Report and Recommendation.

detectives, and insurance investigators. I always had the feeling he was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death for specific Coroner's cases.

"Mr. Walter also attended the periodic case reviews and scientific discussions including Psychological Profiles held by the Coroner. He also attended the scientific departmental discussions in meetings of both the Toxicology Section and the Forensic Investigations Section of the Coroner's Department. He sought and was sought after for one-on-one discussions with pathologists working on specific cases and presented materials in some of the meetings. He discussed evidence and case details with Toxicologists and with Forensic Science Investigators in the Department."

Ibid. (emphasis added).⁸ While the letter sheds some light on Walter's activities during his employment with the Medical Examiner's Office, it confirms that activities such as seeking out pathologists for one-on-one consultation and discussing cases with detectives and other investigators were not the activities for which Walter was compensated. Indeed, Griesemer's statement that he "always had the feeling [Walter] was striving to search out the facts and achieve a more complete understanding of underlying circumstances and individual causes of death ***" contrasts markedly with Walter's own sworn testimony that he developed profiles in order to "not only help the pathologists and the

⁸ Although the statements in the letter were not made under oath, it is appropriate for the Court to consider the contents of the letter because it is accompanied by Griesemer's affidavit affirming that the statements were true when the letter was written in October 1995 and remain true to present.

investigating agencies figure out what happened, but also then towards leads in resolving the case ***.” Trans. at 791.

Griesemer’s letter indicates that Walter *attended* psychological profiles, not that he developed such profiles or that he was expected to develop such profiles in the course of his duties. What is clear is that Walter engaged in the tasks he described at trial only informally and on his own initiative and that he was not employed by the Medical Examiner’s Office to do so. Thus, his trial testimony was false.

Furthermore, the Court cannot conclude that Walter was confused or misled by the prosecutor’s question at trial. The prosecutor asked simply, “What did you do for the Medical Examiner’s Office?” The natural response to such question is a description of the work one is paid to perform. From all indications, if Walter had performed only those tasks he described at Drake’s trial, he would not have been performing the job he was apparently hired to do. Despite all evidence — including Walter’s own deposition testimony — demonstrating that one of Walter’s primary responsibilities was working in and maintaining the laboratories, at the Drake trial Walter did not even mention any work in the laboratories. Thus, the Court cannot conclude that Walter’s false testimony in this regard could have been caused by confusion or mistake. Accordingly, for purposes of this motion, the Court will presume that Walter committed perjury

with respect to his testimony concerning his work experience in the Medical Examiner's Office.⁹ The Court therefore turns to the issue of whether the prosecution knew or should have known of the perjury.

B. The Prosecutor's Knowledge

The relevant inquiry is whether the prosecution knew or should have known that Walter testified falsely at trial. Drake asserts that

"the pertinent and material facts show that the prosecutor attempted to insulate himself from [Walter's false testimony] by playing deaf and dumb, demonstrating at a minimum that he should have known of the deception being practiced, and by his conduct probably allowed, permitted and used the false information to his advantage to secure [Drake's] conviction. This latter view supports the claim that the prosecutor was actually aware of the deception."

Drake's Opp'n Mem. at 2. Essentially, Drake argues that Walter's claimed credentials should have raised red flags with the prosecution and, had those red flags been heeded, the prosecution would have been aware of Walter's perjury at trial. In order to evaluate Drake's argument, the Court must consider the information possessed by the prosecution at the time of the trial.

Peter Broderick's Deposition

Peter Broderick, now a Niagara County Court Judge, was the District Attorney for Niagara County at the time of the Drake trial and he prosecuted the

⁹ The testimony clearly was false. However, the Court declines to hold that Walter committed perjury.

case himself. He was deposed by counsel in this case on August 21 and November 26, 2003.¹⁰

Broderick testified that, shortly before the commencement of the Drake trial, he was informed by the Niagara County Medical Examiner's Office that swabs taken from the female victim did not contain evidence of semen as originally thought. Broderick discussed this development with Dr. Lowell Levine, the prosecution's expert forensic odontologist. Aug. Dep. at 15. Levine suggested that Broderick contact Walter. Aug. Dep. at 14-15. Levine told Broderick that Walter was a member of the American Academy of Forensic Sciences. Aug. Dep. at 38; Nov. Dep. at 8. Levine also told Broderick that Walter worked within the Michigan prison system and that Walter's responsibility was to debrief serious sex offenders and their families, religious advisors and probation officers in order to determine "what made them tick" and what led them to commit their crimes. Aug. Dep. at 38-39. As best Broderick could recall, his conversation with Levine was the first time he had heard of Walter. Aug. Dep. at 14-15.

Through an examination of telephone records, Broderick agreed that he was in contact with Walter by October 7, 1982. Aug. Dep. at 36-37. Their initial conversation consisted of Broderick giving Walter some of the basic facts in the

¹⁰ The transcripts of those depositions were independently paginated. Therefore the Court will refer to the August 21 deposition as "Aug. Dep." and to the November 26 deposition as "Nov. Dep."

case. Aug. Dep. at 43; Nov. Dep. at 4. According to Broderick, during his initial contact with Walter, he:

“gave him a thumbnail sketch of the evidence in the case, the type of crime that was involved, and [the] fact that – I know we discussed the bite mark question. and I can’t remember exactly what I told him in terms of details. I gave him, say, a basic idea of what the case was about.”

Aug. Dep. at 38. In response, Walter said that he needed some time before he could give Broderick his opinion. Aug. Dep. at 44; Nov. Dep. at 4. Either later the same day or the following day, Walter called Broderick back and said that he believed picquerism was involved. Aug. Dep. at 44; Nov. Dep. at 4. Walter then explained picquerism to Broderick and sent Broderick a couple of books that discussed it. Aug. Dep. at 44. Broderick did not reach out to any other mental health professional for additional information about picquerism. Nov. Dep. at 5.

Broderick did not ask Walter anything about his qualifications during their initial conversation. Aug. Dep. at 38; Nov. Dep. at 7. Nor did Broderick ask Walter for a curriculum vitae (“CV”). Nov. Dep. at 15. Broderick normally did not request an expert’s CV at the time he retained the expert. Nov. Dep. at 15. Broderick would simply ask the expert to discuss his or her credentials during an interview. Nov. Dep. at 15.

Broderick first recalled discussing Walter's qualifications upon Walter's arrival in Buffalo the night before he was to testify at the trial.¹¹ He stated:

"I would have to say that's correct. I have no recollection of discussing his curriculum vitae in any of the previous conversations. I'm not saying it didn't happen. I'm saying I don't recall."

Nov. Dep. at 17. Broderick did not question Walter about his credentials until he had picked Walter up from the airport. Aug. Dep. at 43. Broderick recalled that most of the information he had elicited from Walter concerning his qualifications would be contained in the handwritten notes Broderick made, (Aug. Dep. at 40-41), during a discussion on the morning of Walter's testimony. Nov. Dep. at 15. Walter told Broderick that he had a Bachelor's of Arts degree from Michigan State and a Master's degree in psychology. Nov. Dep. at 15. Broderick believed that a reference in his notes to Northern Michigan University pertained to some kind of teaching or instructing, not to Walter's education. Nov. Dep. at 16.

Broderick could not recall an occasion as a prosecutor, prior to the Drake trial, when he had utilized a mental health professional as a witness except possibly in rebuttal. Nov. Dep. at 5. He did not do any research as to what qualifications would be necessary in order to call oneself a psychologist. Nov. Dep. at 5-6. Broderick assumed that, at the time of trial, he would have known that generally one must have some college education and a license to hold oneself

¹¹ Drake's trial began on October 19 and Walter testified on October 22, 1982.

out as a psychologist. Nov. Dep. at 6. Broderick stated that he did not know at the time of trial, nor did he know at the time of his deposition, whether in the State of New York, one must have a Ph. D. in order to call himself a psychologist. Nov. Dep. at 7.

Based on the notes of his conversation with Walter on the morning of Walter's testimony, Broderick concluded that he must have asked Walter if he had written or published any papers, but could not recall Walter's answer. Nov. Dep. at 17-18. Because the topic "papers" was crossed out in his notes, Broderick agreed that a fair assumption would be that Walter had denied writing or publishing any papers, but Broderick had no independent recollection of Walter's answer in that regard. Nov. Dep. at 17-18. With respect to Walter's prior testimonial experience as an expert witness, initially Broderick could not recall asking Walter in his pre-testimony interview if Walter had any such experience, but Broderick also stated that it would have been a standard question for him to ask. Aug. Dep. at 40. Broderick's notes revealed that he had discussed Walter's prior expert testimony, but the notes were ambiguous as to in how many jurisdictions Walter had been so qualified. Nov. Dep. at 18-21.

"Q: The next topic is qualifications in California I think?

"A: Yes.

"Q: And you have two jurisdictions. Is that two jurisdictions or two juries?

"A: It looks like J-U-R-S, but I don't know what that means. It probably - - yes, I would have to say probably qualified in two jurisdictions in California to testify."

Nov. Dep. at 18. Broderick further testified that he had no recollection of inquiring of Walter as to the specific subject matter of his testimony on those prior occasions.

"Q: When you prepared him to testify in this case, did you inquire of him as to what area he had been qualified to testify in?

"A: I have no recollection of that.

"Q: Would it have been important to you to know that he testified as a witness on a chain of custody of a piece of evidence that had come into a lab, rather than to testify as to psychological matters.

"A: Well, obviously, yes.

"Q: Did you inquire of him when you prepared him as to what it was he testified about?

"A: I have no recollection of asking that question."

Nov. Dep. at 19.

At the time of the deposition, Broderick recalled that Walter had told him that he had worked on upwards of 10,000 cases for the Los Angeles Medical Examiner's Office and that "he did profiling for unsolved or uncharged crimes. He would give the police officers an idea of who they were looking for." Aug. Dep. at 41. Broderick did not ask Walter for any references from the Los Angeles Medical Examiner's Office to verify Walter's experience. Aug. Dep. at 41-42. At his deposition, counsel for Drake obtained an admission from Broderick that a

claim to have conducted 10,000 criminal profiles seems extraordinary. Aug. Dep. at 42.

In response to some general questions at his deposition as to why he did not confirm Walter's qualifications, Broderick stated that he believed Walter to be qualified based on his conversations and interview.

"Q: Why did you reach out to this unknown person, Mr. Walter, in Marquette, Michigan to assist you in presenting this case to this jury rather than finding someone local?

"A: Find someone local?

"Q: Yes.

"A: I never even thought to look locally because Levine told me this is the person you should call.

"Q: Did you ever school yourself in this area after you got the books from Mr. Walter by asking someone local as to the benefits of this diagnosis?

"A: Well, as you can see in the dates, I had about two weeks and I was preparing for a murder trial. I took no time. I made no effort to reach out to anybody. In my mind it was not a huge part of the case. I had people who caught this defendant in the act of putting a naked girl in the trunk of a car and all I needed was some reasonable explanation for why this thing happened and when I lost the sperm evidence a couple of weeks before the trial, I was just looking for someone to give an explanation to the jury as to why this happened. Not that I needed to, but I think juries are always interested in knowing why.

"Q: Certainly you're aware, and you charge it all the time, that the prosecution need not prove motive?

"A: Correct."

Nov. Dep. at 26. Broderick conceded that he did no objective verification of Walter's stated credentials.

"Q: Let me ask it this way: Other than talking to the man and getting him referred to you by Dr. Levine, did you make one phone call to anybody to checkup on this guy?

"A: No.

"Q: Did you write a letter to anyone?

"A: No. I never met him until the night before he testified.

"Q: I understand. Did you have anybody on your staff either write or send a letter to anyone to see about his qualifications?

"A: No, I didn't. I didn't make any decision about presenting his testimony until I met him and talked to him. It was probably that night, Thursday night, that I decided that he knew what he was talking about and had the qualifications to testify as an expert. At least I could present him to the court.

"Q: So would it be a fair statement then that before he actually showed up on the scene and you saw him in person and talked to him you weren't sure whether you were going to use him or not?

"A: That's correct.

"Q: So he sold you on his credentials and his capability to talk reasonably about this topic?

"A: Right, and the book."

Nov. dep. at 30-32. On cross-examination, Broderick further clarified that the procedure he used to vet Walter was the same as that he used with respect to other expert witnesses.

"Q: I have a few questions. You talked earlier about experts. During the course of your years as an assistant district attorney and then a district attorney, had you tried cases where you used experts?

"A: Yes.

"Q: Cases where you used doctors?

"A: Yes.

* * * * *

"Q: And did you meet with the doctors and the medical - - did you meet with the doctors and with the accident reconstruction experts prior to putting them on?

"A: Yes.

"Q: And would you ask the doctors if you hadn't used them before some basic questions about their qualifications?

"A: I used the same technique with those people as I did with Walter.

* * * * *
"Q: So would it be fair to say that in our case it would be true that you were following the same guidelines that you used as a district attorney and as an assistant district attorney?

"A: Yes.

"Q: And when you would ask a medical doctor if he had been qualified in another court to testify as an expert, did you ever ask him whether it was as an expert as a medical doctor as opposed to say, a plumber or did you assume that based on the reason for his testimony that the two of you were talking about the same thing, namely that he was an expert qualified as a medical doctor?

"A: That's correct.

* * * * *
"Q: Now, let's turn to our case.

"A: I never questioned a doctor about his education or background or previous testimony, as a psychiatrist or a chemist or anybody else. I sat them down and determined from their testimony that this is what they were going to say and I presented it to the court.

"Q: Well, along that vain [sic] then, had you ever in any of the times you used an expert made a checkup call to checkup on the qualifications that the expert had told you that he had?

"A: Only in a couple of occasions and that was with respect to defense experts.

"Q: Okay, so none of the experts that you had called on your own that you had met with did you ever make a checkup call, correct?

"A: Correct. Not to my recollection today. I don't recall ever having done that."

Nov. Dep. at 32-35.

Broderick stated that he reached his conclusions as to whether Walter was qualified to testify as an expert based on his discussions with Walter upon his

arrival in Buffalo. Aug. Dep. at 43. Broderick testified that once Walter arrived in Buffalo, Walter explained other characteristics of picquerists — characteristics displayed by Drake — which led Broderick to more confidently conclude that Walter was qualified to provide expert testimony at trial. Nov. Dep. 27-28.

“A: Well, that didn’t concern me. All I wanted to do was have him give his explanation and let the jury hear it. I made no idea of how to present it better or - - I never thought about that. He had given me facts about this case that he couldn’t have known as I drove him from the airport to the hotel on Thursday night.

“He was giving me an explanation of the type of people and how they conduct this type of syndrome and he was telling me things about Robie Drake that existed in my case that he couldn’t have known. That was one of the things that told me that he knew what he was talking about.

“Principally, that often times in individuals who engage in this kind of conduct are so exhausted at the conclusion - - this was just an aside that he was telling me as we drove, that they fall asleep because of the exhaustion. In this case - - and that was one of the aspects I never really thought about.

“Detective Giles had testified that he was in fact asleep when he arrived in the back of the police car and I frankly had not given it any thought. I didn’t believe it. I thought it was probably being feigned having been caught in the act and when Walter said that to me it like rang a bell. I said apparently this is what happened in this case.”

Nov. Dep. at 27-28. Broderick also recalled Walter mentioning a likelihood that the picquerist subscribes to “soldier of fortune” and “commando”-type

publications and that the picquerist may have a history of "Peeping Tom" offenses. Nov. Dep. at 35-38. Broderick's confidence in Walter's opinions was bolstered by these revelations because, at the time of his arrest, Drake had a "significant number" of commando-type publications in his room and Drake also had either a prior charge or conviction for "Peeping Tom" activity. Nov. Dep. 35-37.¹²

When interviewing Walter, Broderick wrote down that Walter had worked on 5,000 to 7,500 cases in Los Angeles. Broderick had no reaction to those numbers but just wrote them down because that's what Walter told him was his experience. Nov. Dep. at 38-39. Broderick had no idea of the size of the Los Angeles Medical Examiner's Office's caseload. Nov. Dep. at 39. Broderick could not recall Walter telling him that he worked for the Medical Examiner's Office as a "student professional worker." Nov. Dep. at 39-40.

Broderick testified that he was more impressed by Walter's work for the Michigan Department of Corrections than his work for the Medical Examiner's Office.

¹²Broderick also recalled, however, that he probably told Walter during their initial conversation that Drake was wearing camouflage clothing at the time of his arrest and that he had been carrying bandoliers of ammunition and two guns. Nov. Dep. at 37. Broderick maintained that he never told Walter that Drake had commando-type publications, that he had a prior history of "Peeping Tom" conduct or that Drake had fallen asleep in the police car on the way to the police station. *Id.* at 37-38.

“A: That’s correct. I think it should be clear that I didn’t think too much about that part of his experience. I was more interested in his experience in the Michigan Department of Corrections; debriefing the worst of the Michigan sexual criminals and their families and their counselors and their ministers in an effort to try to find out what makes people do the things they are convicted of. That to me in and of itself with his educational background would have qualified him to testify in this case or in any case about sexual deprivation.”

Nov. Dep. at 40-41.¹³

Knowledge of the Prosecution

In light of the information adduced at Broderick’s deposition, Drake contends that Broderick “permitted [Walter] to expand his role to its zenith,” “took him at face value, didn’t care much for his background, didn’t inquire as a good trial lawyer would and should do and permitted the witness to run amok,” and that “a bell should have rung in the prosecutor’s head telling him that this witness was a fraud,” and “[Broderick’s] lack of interest in the qualifications of his witness suggests that ‘don’t ask, don’t tell’ was the watchword of the day.”

Drake’s Opp’n Mem. at 16-17, 23. Essentially, Drake argues that the prosecutor

¹³ This Court is confused, however, as to how Broderick came to believe that Walter “debrief[ed] the worst of the Michigan sexual criminals” when there is no mention of that activity in Walter’s trial testimony or his deposition testimony. At trial, Walter described his then-current position with the Michigan Department of Corrections as one of recommending treatments and programs for mentally ill inmates and as an advisor to the parole board. Trans. at 786. Certainly interviews with the inmates would be part of those functions, but there is no indication that Walter did so in an effort to figure out the individual as opposed to an effort to recommend appropriate treatment or to advise the parole board’s determination as to whether a particular inmate should be released.

either knew that Walter's credentials were exaggerated and deliberately chose not to verify them or should have known that Walter was exaggerating and would have known had he taken steps to verify them.

In *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), the district court had concluded that the government should have been aware of its witness's perjury. Therein, the government's chief witness, Guariglia, was a compulsive gambler who represented on direct examination at trial that he had ceased gambling in 1998 and had not gambled up to and including the time of trial. *Id.* at 455. On cross-examination, defense counsel elicited testimony that the witness had signed gambling markers at the Tropicana in Atlantic City, New Jersey in September and October of 1998 — after he had allegedly ceased gambling. *Id.* at 455-56. Once such information was revealed, the prosecution conferred with the witness and investigated his explanation that he had cashed in the markers but had not gambled. The prosecution verified the witness's story with others who were allegedly present on those occasions, but was not able to verify with the Tropicana that the witness had not gambled. Despite not being able to verify his explanation in its entirety, the prosecution — in order to rehabilitate the witness — had him explain his actions to the jury on redirect. *Id.* at 457. That explanation was later proven to be false and, during the trial, the prosecution was made aware of "powerful evidence" that Guariglia was lying.

Id. at 456-57. In concluding that the government should have known of the perjury, the court stated:

“In light of Guariglia’s acknowledged history of compulsive gambling, we believe that given the inconsistencies in his statements the government should have been on notice that Guariglia was perjuring himself. Yet, instead of proceeding with great caution, the government set out on its redirect examination to rehabilitate Guariglia and have elicited his rather dubious explanation of what had happened. Defendants placed before the government and the court powerful evidence that Guariglia was lying. *** We fear that given the importance of Guariglia’s testimony to the case, the prosecutors may have consciously avoided recognizing the obvious – that is, that Guariglia was not telling the truth.”

Wallach, at 457.¹⁴

In *Turner v. Schriver*, 327 F. Supp.2d 174 (E.D.N.Y. 2004), Clarke, who was the alleged victim of the crime and the crucial prosecution witness, testified falsely that he did not have a criminal record. *Id.* at 178. Prior to trial, the defense had requested that the prosecution provide a copy of all criminal records of all prosecution witnesses. *Id.* at 184. The prosecution had failed to verify whether Clarke had a criminal record and instead relied on Clarke’s representation that he had no record. *Id.* at 182. In concluding that the prosecution should have known of Clarke’s perjury, the court stressed that, had the prosecution made even

¹⁴ The Court also stated that a new trial would be warranted under the circumstances even assuming that the prosecution was unaware of the false testimony. *Wallach*, at 458.

a perfunctory effort¹⁵ to satisfy its obligation under *Brady v. Maryland*, 371 U.S. 812 (1962), the prosecution would have known that Clarke was lying at the trial. *Turner*, 327 F. Supp.2d at 186-187.

In the instant case, however, with the exception of Walter's testimony concerning his prior publications, Drake fails to point to any concrete example of information that might have alerted Broderick to the possibility that Walter was exaggerating his qualifications. Walter and Broderick discussed Walter's qualifications on the morning prior to Walter's trial testimony. Broderick took notes of that conversation on which the topic "papers" is crossed out. See Drake's Opp'n Mem. at Ex. 2. Drake argues that such a crossed-out notation indicates that Broderick had asked Walter if he had written or published any papers and that Walter had responded in the negative. Accordingly, the argument continues, Broderick knew or should have known that Walter testified falsely at trial when he was asked if he had written any papers and answered "yes."

At deposition, Broderick agreed such an interpretation would be a "fair assumption" but could not say that that was what had occurred.

"Q: Now, going down the page on Exhibit 14, you have a topic, papers. Do you see what this is?

¹⁵ "The information requested was readily available to the prosecution had it made the most modest effort." *Turner*, at 185.

"A: That would have been dissertations or papers he had written or published.

"Q: And then you crossed it out. Does that mean that you inquired of him whether he had been published in some fashion and he indicated that he had not?

"A: I think that's a fair assumption, but I can't tell you right now."

Nov. Dep. at 17-18. As has been shown, however, Walter was asked at trial whether he had *written* any papers prior to the date of his testimony. He was not asked whether or not he had published any such papers. Drake has not provided any evidence demonstrating that Walter's testimony in response to the question actually posed was false. Thus, even if his trial response was inconsistent with his earlier representation to Broderick, Drake cannot show that Broderick knowingly elicited false testimony because Drake cannot show that the trial testimony was false. Assuming for purposes of this analysis that Walter's trial testimony was inconsistent with the response he had given Broderick during their morning conversation, at most, Broderick might have been prompted to seek clarification from Walter regarding that inconsistency. It does not indicate that Broderick should have considered that Walter exaggerated his other qualifications.

Drake also makes much of Broderick's admission that 10,000 seems like an "extraordinary" number of profiles for Walter to have worked on at the Medical

Examiner's Office.¹⁶ See Aug. Dep. at 42. That hardly seems the point, however, when Drake has shown that Walter testified falsely about the duties he was employed to perform, not the number of cases on which he had worked. Drake points to no evidence suggesting that Broderick knew — or should have suspected — that Walter's official duties were not those he had described at trial. There is no evidence to suggest that Walter ever gave any indication that his work for the Medical Examiner's Office involved *anything other than* psychological work.

Moreover, even assuming that Drake is correct and that, in light of the "extraordinary" number of cases in which Walter claimed to have involvement, Broderick should have verified Walter's credentials, that such verification would have prevented or uncovered Walter's falsehoods is mere speculation. Unlike the perfunctory computerized criminal records check which would have revealed the perjury in *Turner*, Walter's exaggeration would only have been discovered upon a thorough investigation of Walter's employment history with the Los Angeles County Medical Examiner's Office.

¹⁶Walter did not testify at trial to having profiled 10,000 cases. He stated that "approximately 40,000 cases" arose while he was employed by the Medical Examiner's Office, that he had "anything to do" with between 7,500 and 10,000 of those cases and that he "had personal involvement with at least *** five thousand to seventy-five hundred" cases. Trans. at 789-790.

Drake faults the prosecution for taking Walter at “face value” and for not “inquir[ing] as a good trial lawyer would and should do.” Those faults can also be attributed to the defense. While the defense does risk making the expert’s credentials seem more impressive by a lengthy interrogation as to the substance of an expert’s prior publications and testimony, the defense could have sought a *voir dire* of Walter outside the presence of the jury¹⁷. Both the prosecution and the defense *assumed* that Walter’s prior expert testimony concerned psychological matters. While that might have been a natural assumption in light of the reason for which Walter’s testimony was offered in this case, the defense also should have been interested in whether Walter had previously testified concerning “picquerism” specifically.

Finally, Broderick emphasized that Walter’s qualifications, his knowledge of characteristics of picquerists that corresponded to evidence in the case of which Walter was unaware and the referral by Dr. Levine — a well-respected expert forensic odontologist —, all contributed to Broderick’s confidence in Walter.

¹⁷ While the Court recognizes that the trial court was concerned about time constraints, it would not have been unreasonable for defense counsel to have sought a brief *voir dire* or latitude on cross-examination to obtain a better picture of Walter’s qualifications, particularly in light of the fact that there is no mention of defense counsel having been provided with Walter’s CV.

Based on all of the above, the Court cannot conclude that the prosecution knew or should have known that Walter had testified falsely at trial.

C. Effect on the Jury

In light of the Court's conclusion that there is no evidence that the prosecution knew or should have known of Walter's false testimony, the Court now turns to the effect, if any, on the jury's verdict. As discussed earlier, if the prosecution neither knew nor should have known of the false testimony, relief must be granted if the Court is left with the firm conviction that, but for the false testimony, Drake would likely have not been convicted. *Wallach*, at 456.

In making this inquiry, the Second Circuit has instructed that courts are to consider "whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness." *Stofsky*, at 246. Furthermore, even when the prosecution was aware of the perjury, a new trial is not warranted when independent evidence supported the conviction. *United States v. Wong*, 78 F.3d 73, 82 (2d Cir. 1996).

The Court cannot conclude that — even if Walter had been confronted at trial with his exaggerations and the jury had determined that he was a charlatan — the jury would have altered its verdict. It is undisputed that the sole issue for

the jury was whether Drake acted with the requisite intent. Broderick's purpose in offering Walter's testimony was to provide the jury with "some reasonable explanation as to why this happened"— in other words, to explain Drake's motive. Nov. Dep. at 26. While Walter's testimony was the only evidence as to possible motive, it was not the only evidence from which the jury could have found that Drake fired his gun into the victims' car with the requisite intent.

At trial, the prosecution introduced Drake's statement that he thought the car was abandoned as well as evidence that he had told an officer that he could not see inside the car because the windows were "fogged up." Trans. at 278. Drake expressed his intention to destroy the car by shooting it, (Trans. at 275) but the physical evidence indicated that all 19 shots were fired into the front of the car — specifically into the front passenger-side window and door — (Trans. at 69, 268, 1027) and that Rosenthal was struck in the head and chest with 14 bullets and Smith was struck in the head with 2 bullets. Trans. at 484, 488-89. Furthermore, upon his opening the car door and reportedly hearing Rosenthal moaning, Drake stabbed him twice. Trans. at 247. Edward Allen Cusatis, one of Drake's fellow inmates, testified that Drake told him that he meant to kill Rosenthal when he stabbed him. Trans. at 723-24. Finally, Theresa Weslowski, a student at the same high school as that attended by Drake and the victims,

testified that she had once heard Drake and Rosenthal exchange swear words at school. Trans. at 558.

Although this evidence does not explain what motivated Drake to commit such an act, its strength is sufficient to demonstrate that Drake intended to commit the act, such that this Court is not left with the firm conviction that the jury would not have convicted Drake had it known of the falsity of Walter's testimony.

Accordingly, Respondent's Motion for Summary Judgment is granted, the Petition is dismissed and the Clerk of the Court is directed to take all steps necessary to close the case.

DATED: Buffalo, N.Y.

March 16, 2006

/s/ John T. Elfvin

JOHN T. ELFVIN
S.U.S.D.J.

United States District Court

WESTERN DISTRICT OF NEW YORK

Robie J. Drake

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 99-CV-681

v.

L.A. Portuondo Superintendent, Shawangunk Correctional Facility

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Respondent's motion for summary judgment is granted, the petition is dismissed and this case is closed.

Date: March 20, 2006

RODNEY C. EARLY,
CLERK

By: s/Deborah M. Zeeb
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

v.

L. A. PORTUONDO, Superintendent
Shawangunk Correctional Facility,

Respondent.

NOTICE OF APPEAL

99-CV-0681E(Sr)

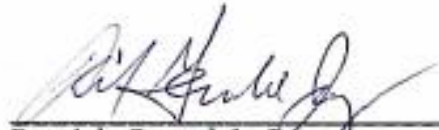
2006 MAR 21 AM 9:03

FILED
U.S. DISTRICT COURT
W.D.N.Y. BUFFALO

NOTICE IS HEREBY GIVEN that the Petitioner, ROBIE J. DRAKE, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment of this Court entered March 20, 2006, and from each and every part of said Judgment.

Dated: Buffalo, New York
March 21, 2006

DAVID GERALD JAY



David Gerald Jay
Attorney for Petitioner
69 Delaware Ave., Suite 1103
Buffalo, New York 14202
Tel: (716) 856-6300

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 3/29/06
Docket Number: 06-1365-pr
Short Title: Drake v. Portuondo
DC Docket Number: 99-cv-681
DC: WDNY (BUFFALO)
DC Judge: Honorable John Elfvig

FILED
U.S. DISTRICT COURT
WDNY-BUFFALO
2006 APR -5 PM 12:56

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of March, two thousand six.

Robie J. Drake,

Petitioner-Appellant,
v.

L. A. Portuondo, Superintendent, Shawangunk Correctional Facility,

Respondent-Appellee.



A notice of appeal having been filed from an order denying relief in a application brought under the provisions of 28 U.S.C. Section 2254, and it appearing that the file of the proceedings does not contain either a certificate of appealability or a denial thereof, it is **ORDERED** that said appeal be, and it hereby is **DISMISSED** without prejudice to the appeal being reinstated upon notice to the Clerk within 30 days from the entry of an order by the district judge granted or denying a certificate of appealability. Any motions pending prior to the entry of this order of dismissal are deemed **MOOT**.

In accordance with Rule 22(b) of the Federal Rules of Appellate Procedure, and Second Circuit Rule 22a, you are hereby directed to promptly move for a certificate of appealability in the district court.

For the Court,
Roseann B. MacKechnie, Clerk

By: Frank Perez
Deputy Clerk

A TRUE COPY
Roseann B. MacKechnie, CLERK

by [Signature]
DEPUTY CLERK

Certified:

MAR 29 2006

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

v.

L.A. PORTUONDO,

Respondent.

NOTICE OF MOTION
AND AFFIRMATION

99-CV-0681E(Sr)

NOTICE OF MOTION

PLEASE TAKE NOTICE that the within Motion will be brought on for a hearing before United States District Judge John T. Elfvin on a date as fixed by the Clerk at the United States Courthouse, Buffalo, New York.

DATED: Buffalo, New York
April 10, 2006

DAVID GERALD JAY



David Gerald Jay
Attorney for Petitioner
69 Delaware Avenue - Suite 1103
Buffalo, New York 14202

TO: MATTHEW J. MURPHY, III
District Attorney of Niagara County
Attn: Thomas H. Brandt, ADA
Niagara County Courthouse
175 Hawley Street
Lockport, NY 14094-2740

appealability or state why a certificate should not issue.

6. The certificate of appealability should issue in this matter since the Court's Decision acknowledges that applicant has made a substantial showing as to the issue of the unreliability of the expert's qualifications and experience which were placed before the jury in the criminal case leading to his conviction, but the Court has determined that the prosecuting attorney was unaware of the fraud which was perpetrated upon the Court and had no duty of further inquiry. It is our belief that the Court's determination on that point is a fair ground for dispute, and should the Court of Appeals agree, the matter will be remanded for a testimonial hearing, at minimum, or may lead to a reversal and granting of the Writ.

7. A certificate of appealability is proper since petitioner should be permitted access to the Court of Appeals so that they can review the matter.

WHEREFORE, affiant requests that the Court issue a certificate of appealability.

Dated: Buffalo, New York
April 10, 2006



David Gerald Jay

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

v.

Docket No. 99cv0681E(Sr)

L. A. PORTUONDO,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2006, I electronically filed the foregoing Notice of Motion and Affirmation with the Clerk of the District Court using its CM/ECF System, which would then electronically notify the following CM/ECF participant on this case:

MATTHEW J. MURPHY, III, Niagara County District Attorney
Attn: Thomas H. Brandt, ADA

I hereby certify that on April 10, 2006 I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, and I mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participant: none



David Gerald Jay

United States District Court
Western District of New York

Robbie J. Drake,
Petitioner,

Affirmation in Opposition
99-CV-0681E(Sr)

v.

L.A. Portuondo,
Respondent.

Thomas H. Brandt, an attorney at law, pursuant to 28 U.S.C. section 1746(2), declares under the penalty of perjury that the following is true and correct:

1. I am the attorney for the Respondent in the above entitled proceeding and make this affirmation in opposition to the Petitioner's application for a Certificate of Appealability.
2. This Court entered a final, appealable, Judgment in this matter on March 20, 2006, that granted the Respondent's motion for summary judgment and dismissed the Petitioner's Petition for a writ of Habeas Corpus.
3. The Petitioner filed a Notice of Appeal on March 31, 2006.
4. The Petitioner's current motion requests that the Court issue a Certificate of Appealability. According to the Petitioner, the Court's determination that the prosecuting attorney was unaware of any possible fraud by his expert witness and had no duty of further

inquiry "is a fair ground for dispute".

5. The Respondent disagrees with this argument. There was no evidence that the prosecuting attorney was aware of any possible fraud by his expert witness and there was no reason for the prosecuting attorney to have conducted secondary investigations into the expert witness's bona fides.

Wherefore, your affirmant requests that the Court deny the motion for a Certificate of Appealability.

Dated: Lockport, New York
April 11, 2006

To: David Gerald Jay
Attorney for Petitioner
69 Delaware Ave
Suite 1103
Buffalo, NY 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

vs.

99-CV-0681E(Sr)

L.A. PORTUONDO,

Respondent.

Certificate of Service

I hereby certify that on April 11, 2006, I electronically filed the foregoing Affirmation in Opposition with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

None

And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

DAVID GERALD JAY, ESQ.
69 Delaware Avenue, Suite 1103
Buffalo, New York 14202

/s/ Thomas H. Brandt
District Attorney's Office
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094
(716-439-7085)
E-Mail: Tom.brandt@niagaracounty.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329,
Petitioner,

99-CV-0681E(Sr)

-vs-

L.A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility,
Respondent.

ORDER

WHEREAS on March 16, 2006 this Court granted Respondent's Motion for Summary Judgment concluding that the Respondent neither knew nor should have known that some of the expert witness's claimed credentials were false; and

WHEREAS on March 20, 2006 the Clerk of the Court issued a Judgment in accordance with this Court's determination; and

WHEREAS on March 21, 2006 Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit; and

WHEREAS on April 5, 2006 said appeal was dismissed without prejudice pending an order of this Court either granting or denying a certificate of appealability pursuant to 28 U.S.C. §2253(c)(1); and

WHEREAS on April 10, 2006 Petitioner filed a Motion for a certificate of appealability; and

WHEREAS on April 11, 2006 Respondent filed an Affidavit opposing said Motion; and

WHEREAS this Court having considered the matters raised in the Motion for certificate of appealability and having previously determined that the Respondent neither knew nor should have known of the perjured credentials, the Court now concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, and it is accordingly

ORDERED that Petitioner's Motion for a certificate of appealability will be denied and a certificate of appealability will not be issued.

DATED: Buffalo, N.Y.

May 16, 2006

/s/ John T. Elfvin

JOHN T. ELFVIN

S.U.S.D.J.

FILED
U.S. DISTRICT COURT
W.D.N.Y. BUFFALO
2006 JUN 14 AM 9:33

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

Robie Drake,

vs.

L.A. Portuondo, Superintendent,

**CLERK'S CERTIFICATION
DOCUMENT(S)/RECORD SENT**
Civil/Criminal No: 99-CV-681
USCA No. 06-1365-pr

I, RODNEY C. EARLY, CLERK of the District Court of the UNITED STATES for the Western District of New York, DO, HEREBY CERTIFY that the foregoing docket entries, with the exception of the documents listed below are maintained electronically on the court's CM/ECF system and constitute the Record on Appeal in the above-entitled action.

Pursuant to the request of the United States Court of Appeals, the original document(s)/record are being sent by mail on June 14, 2006.

Docket # 1 - 45
Docket # 47, 52, 53, 54, 58 - TRANSCRIPTS
Docket #

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereto affixed at the City of Buffalo, New York, this 14th day of June, 2006.

Rodney C. Early, Clerk
U.S. District Court

s/ Diane Radloff
By: Diane Radloff
Deputy Clerk

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

Robie J. Drake,

-VS-

L.A. Portuondo, Superintendent,

99-CV-681

Docket No. 06-1365-pr

INDEX TO RECORD ON APPEAL

CLOSED_2006

**U.S. DISTRICT COURT
 WESTERN DISTRICT OF NEW YORK [LIVE] (Buffalo)
 CIVIL DOCKET FOR CASE #: 1:99-cv-00681-JTE**

Drake v. Portuondo

Assigned to: Hon. John T. Elfvin

Demand: \$0

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 09/21/1999

Jury Demand: None

Nature of Suit: 530 Habeas Corpus
 (General)

Jurisdiction: Federal Question

Date Filed	#	Docket Text
09/21/1999	1	PETITION for writ of habeas corpus; FILING FEE \$ 5. RECEIPT # 75490 (JMD) (Entered: 09/21/1999)
09/24/1999	2	ORDER, directing petitioner to complete the attached form entitled "Petitioners response as to why the petition is not time-barred under 28 USC 2244(d)(1) " and return it to the Clerk by 10/27/99, failure to return the properly completed form by that date will result in the dismissal of the petition an an abuse of the writ of habeas corpus. (signed by Chief USDJ David G. Larimer) Notice and copy of order sent to Robie J. Drake (JMD) (Entered: 09/27/1999)
10/27/1999	3	RESPONSE by petitioner Robie J. Drake to the Court's [2-1] Order (JMD) (Entered: 10/27/1999)
11/03/1999	4	MOTION by Robie J. Drake to Proceed in Forma Pauperis (JMD) (Entered: 11/04/1999)
11/15/1999	5	ORDER mootng [4-1] motion to Proceed in Forma Pauperis, respondent is directed to file an answer to the petition by 12/20/99, petitioner shall have 30 days upon receipt to file a response thereto, within 30 days from the date the answer is filed with the Clerk, respondent may file a motion for a more definite statement or to dismiss, the Clerk shall serve a copy of the petition with a copy of petitioners response to the Court's order to show cause and a copy of this order via certified mail upon respondent, the Assistant Attorney General and the Niagara County District Attorney (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Robie J. Drake, respondent, Assistant Attorney General , Niagara County District Attorney (JMD) (Entered: 11/15/1999)
11/30/1999	6	ORDER REFERRING CASE to USMJ Carol E. Heckman for all proceedings necessary to determine the merits of the facts and legal issues presented by this action and thereafter to file a report and recommendation. (signed by Senior USDJ John T. Elfvin) Notice and copy sent to Robie J. Drake . (JMD) (Entered: 11/30/1999)

12/20/1999	7	ANSWER to Complaint by L. A. Portuondo (Attorney Thomas H. Brandt), (JMD) (Entered: 12/20/1999)
12/20/1999	8	CERTIFICATE OF SERVICE by respondent L. A. Portuondo re: [7-1] answer (JMD) (Entered: 12/20/1999)
01/18/2000	9	REPLY AFFIDAVIT by petitioner Robie J. Drake to defendants [7-1] answer (JMD) (Entered: 01/18/2000)
02/02/2000		RECEIVED State Court Records from Niagara County District Attorney Volumes I, II and III (JMD) (Entered: 02/02/2000)
03/03/2000	10	MOTION by petitioner Robie J. Drake for Discovery pursuant to Rule 6 with affidavit and exhibits in support. (JMD) (Entered: 03/06/2000)
03/27/2000	11	AFFIDAVIT by Thomas Brandt counsel for respondent L. A. Portuondo in opposition to [10-1] motion for Discovery pursuant to Rule 6 by Robie J. Drake (JMD) (Entered: 03/28/2000)
04/03/2000	12	Request for extension of time to reply to respondents answer filed by plaintiff (JMD) (Entered: 04/03/2000)
04/05/2000	13	ORDER granting petitioners [12-1] request for extension of time to reply petitioner may have until 5/5/00 to file the reply (signed by USMJ Carol E. Heckman) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 04/06/2000)
05/04/2000	14	REPLY AFFIRMATION by petitioner Robie J. Drake in support of [10-1] motion for Discovery pursuant to Rule 6 (JMD) (Entered: 05/04/2000)
06/02/2000	15	ORDER all orders of reference to USMJ Heckman are hereby modified to provide for reference to USMJ H. K. Schroeder Jr., in all other respects the terms of the orders of reference remain the same (signed by Chief USDJ David G. Larimer) Notice and copy sent to Thomas H. Brandt, Robie J. Drake . (JMD) (Entered: 06/07/2000)
12/07/2000	16	REPORT AND RECOMMENDATIONS of USMJ H. K. Schroeder Jr. . recommending that petitioners motion for evidentiary hearing and petition for haebas corpus be denied. Case no longer referred to USMJ H. K. Schroeder Jr. . Notice and copy to Thomas H. Brandt, Robie J. Drake Objections due ten days from receipt. (JMD) (Entered: 12/07/2000)
12/18/2000	17	MOTION by petitioner Robie J. Drake to Extend Time to file objections (JMD) (Entered: 12/19/2000)
12/21/2000	18	ORDER granting petitioners [17-1] motion to Extend Time to file objections, Objections reset to 1/19/01 for [16-1] report and recommendations (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 12/21/2000)
01/19/2001	19	OBJECTION by petitioner Robie J. Drake to [16-1] report and recommendations (JMD) (Entered: 01/19/2001)

01/22/2001		NOTICE (JTE) a proceeding has been set for 3:00 pm on 2/9/01 re: petitioners objections to Magistrate Judge's report and recommendation (JMD) (Entered: 01/23/2001)
02/09/2001	21	Minute entry: petitioners [19-1] objections to Magistrate Judge's report and recommendation is submitted on the papers. JTE (JMD) (Entered: 02/15/2001)
02/14/2001	20	REPLY AFFIRMATION by petitioner Robie J. Drake to affirmation of Thomas Brandt dated 2/2/01 (JMD) (Entered: 02/14/2001)
03/16/2001	22	ORDER petitioners objections are overruled, the R & R is adopted in its entirety the [1-1] petition for writ of habeas corpus is dismissed and this case shall be closed, there having been no substantial showing by petitioner of the denial of a constitutional right, the Court declines to issue a certificate of appealability (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 03/16/2001)
03/16/2001	23	JUDGMENT for respondent L. A. Portuondo against Robie J. Drake (Clerk). Notice and copy of judgment sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 03/16/2001)
03/16/2001		Case closed (JMD) (Entered: 03/16/2001)
03/20/2001		RETURNED State Court Records (JMD) (Entered: 03/20/2001)
04/12/2001	24	NOTICE OF APPEAL by Robie J. Drake . Fee Status: Fee Not Paid (Notice and copies to Thomas Brandt Clerk USCA with copy of docket entries) (JMD) Modified on 04/17/2001 (Entered: 04/12/2001)
04/12/2001	25	MOTION by Robie J. Drake to Proceed on Appeal in Forma Pauperis (JMD) (Entered: 04/12/2001)
04/16/2001	26	MOTION by petitioner Robie J. Drake for Reconsideration of [22-1] order (JMD) (Entered: 04/16/2001)
04/17/2001		Certified and transmitted record on appeal to U.S. Court of Appeals: [24-1] appeal by Robie J. Drake (JMD) (Entered: 04/17/2001)
05/04/2001	27	ORDER denying petitioners [26-1] motion for Reconsideration of [22-1] order and denying petitioners [25-1] motion to Proceed on Appeal in Forma Pauperis (signed by USDJ Charles J. Siragusa) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 05/07/2001)
03/18/2002	28	MOTION by petitioner Robie J. Drake to Vacate [23-1] judgment order with affidavit and exhibits in support (JMD) (Entered: 03/19/2002)
03/18/2002	29	MEMORANDUM of LAW by petitioner Robie J. Drake in support of [28-1] motion to Vacate [23-1] judgment order (JMD) (Entered: 03/19/2002)
04/09/2002	30	ORDER denying petitioners [28-1] motion for reconsideration. (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 04/09/2002)

05/09/2002	31	NOTICE OF APPEAL by Robie J. Drake . Fee Status: Fee Not Paid - Fee Due (copy to Thomas H. Brandt and to Clerk, USCA, with copy of docket entries). (DR) (Entered: 05/09/2002)
05/17/2002		Certified and transmitted record on appeal to U.S. Court of Appeals: [31-1] appeal by Robie J. Drake (DR) (Entered: 05/17/2002)
06/17/2002		Original Motion for Permission to Appeal in forma pauperis was forwarded to the USCA. (DR) (Entered: 07/19/2002)
01/07/2003	32	ORDER OF USCA (certified copy) Re: [31-1] appeal by Robie J. Drake, [24-1] appeal by Robie J. Drake dismissing the appeal without prejudice to the appeal being reinstated upon notice to the Clerk within 30 days from the entry of an order by the district judge granting or denying a certificate of appealability. Appellant is directed to promptly move for a certificate of appealability in the district court. (DR) (Entered: 01/07/2003)
01/22/2003	33	MOTION by Robie J. Drake for a Certificate of Appealability (DR) (Entered: 01/22/2003)
02/04/2003	34	ORDER denying petitioners [33-1] motion for a Certificate of Appealability. (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 02/05/2003)
02/06/2003		Record on appeal returned from U.S. Court of Appeals: [31-1] appeal by Robie J. Drake, [24-1] appeal by Robie J. Drake (JMD) (Entered: 02/06/2003)
02/13/2003	35	ORDER, counsel shall appear at 3:00pm on 5/2/03 for a status conference with respect to an evidentiary hearing as well as the status of the individuals involved in Drake's 1982 murder trial . (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 02/14/2003)
02/13/2003		Case reopened (JMD) (Entered: 02/14/2003)
03/07/2003	36	MOTION by Robie J. Drake for Appointment of Counsel (JMD) (Entered: 03/07/2003)
04/01/2003	37	OPINION AND ORDER OF USCA (certified copy) Re: [31-1] appeal by Robie J. Drake vacating the judgment of said district court and remanding in accordance with the opinion of this Court. (DR) (Entered: 04/01/2003)
04/11/2003	38	ORDER denying without prejudice plaintiffs [36-1] motion for Appointment of Counsel (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 04/11/2003)
05/02/2003	39	Status conference held and defendant to move. JTE (JMD) (Entered: 05/06/2003)
05/06/2003	40	ORDER granting petitioners' [36-1] motion for Appointment of Counsel, and counsel shall appear at 3:00pm on 6/27/03 to set a date for an

		evidentiary hearing in accordance with the Court of Appeals decision. (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake (JMD) (Entered: 05/06/2003)
05/22/2003	41	ORDER, Appointing David Jay as Counsel to represent petitioner. The Clerk is directed to copy the file and send it to attorney David Jay. Set Status Conference for 3:00pm on 6/27/03. (signed by Senior USDJ John T. Elfvin) Notice and copy of order sent to Thomas H. Brandt, Robie J. Drake David Jay (JMD) (Entered: 05/22/2003)
05/23/2003		State Court Records - One Volume - returned from the USCA. (DR) (Entered: 05/27/2003)
06/27/2003	42	Minute entry: parties to conduct evidentiary hearing then oral argument. JTE (JMD) (Entered: 07/07/2003)
06/28/2003		WRIT of Habeas Corpus Ad Prosequendum et Testificandum issued. (JMD) (Entered: 07/02/2003)
07/02/2003		Clerk mailed certified copies of writ of habeas corpus ad prosequendum et testificandum to David Jay, Thomas Brandt, Superintendent Shawagunk Correctional Facility and to US Marshal Service and mailed copy of writ to plaintiff Drake. (JMD) (Entered: 07/02/2003)
07/11/2003	43	Writ of habeas corpus ad prosequendum et testificandum issue (filed in chambers). Certified copies hand delivered to US Marshal (mj) (Entered: 07/14/2003)
07/14/2003		Copy of writ issued 7/11/03 forwarded to Niagara County Sheriff, Robie Drake, Thomas Brandt and David Jay. (mj) (Entered: 07/14/2003)
09/26/2003	44	CJA 24 Authorization to Pay Paula Seekins \$ 642.50 for Transcript Voucher # 030925000018 (Signed by Senior USDJ John T. Elfvin) (JMD) (Entered: 09/26/2003)
12/01/2003	45	ORDER the Writ of Habeas Corpus Ad Prosequendum et Testificandum is discharged and the Sheriff of Niagara County is free to deliver the body of Robie J. Drake to the New York State Department of Corrections. Signed by Judge John T. Elfvin on 11/28/3. (JMD,) Modified on 12/3/2003 (JMD,). In addition to Notice Parties copies also forwarded to US Marshal and to Inmate Records Coordinator Frances Woodruff Shawangunk Correctional Facility (Entered: 12/02/2003)
02/03/2004	46	CJA 24: Authorization to Pay DePaolo Crosby Reporting \$ 189.20 for Transcript, Voucher # 040126000018.. Signed by Hon. John T. Elfvin on 1/23/04. (JMD,) Additional attachment(s) added on 2/13/2004 (JMD,). (Entered: 02/03/2004)
03/03/2004		Minute Entry for proceedings held before Judge John T. Elfvin : Status Conference set for 4/16/2004 03:00 PM before Hon. John T. Elfvin. Notice sent to Robie J. Drake, David Gerald Jay. (JBS,) (Entered: 03/03/2004)

04/16/2004	●	Set/Reset Hearings: Status conference scheduled to be held on 4/16/04 adjourned at request of counsel. Status Conference re-set for 5/21/2004 03:00 PM before Hon. John T. Elfvin. (JBS,) (Entered: 04/16/2004)
05/21/2004	●	Minute Entry for proceedings held before Judge John T. Elfvin : Status Conference held on 5/21/2004. Defendant to serve and file summary judgment motion. Appearances: David G. Jay (courtroom); Thomas H. Brandt (on telephone.) (Court Reporter kp.) (JBS,) (Entered: 05/24/2004)
06/07/2004	●47	TRANSCRIPT of Proceedings held on May 21, 2004 before Judge John T. Elfvin. Court Reporter: Michelle McLaughlin. Pages 1- 4. Transcript maintained in paper form in the Clerk's office (JMD,) (Entered: 06/07/2004)
09/24/2004	●48	MOTION for Summary Judgment by L. A. Portuondo. (Brandt, Thomas) (Entered: 09/24/2004)
09/24/2004	●49	AFFIDAVIT of Service for Motion for Summary Judgment served on David Gerald Jay, Esq. on September 24, 2004, filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 09/24/2004)
09/28/2004	●50	MOTION to Amend/Correct 48 MOTION for Summary Judgment by L. A. Portuondo. (Brandt, Thomas) (Entered: 09/28/2004)
09/28/2004	●51	AFFIDAVIT of Service for Amended Notice of Motion for Summary Judgment served on David Gerald Jay on September 28, 2004, filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 09/28/2004)
09/30/2004	●	Minute Entry Judge John T. Elfvin : Set Deadlines/Hearing as to 48 MOTION for Summary Judgment:. Responses due by 10/29/2004 Replies due by 11/3/2004. Motion Hearing set for 11/5/2004 03:00 PM before Hon. John T. Elfvin. (JBS,) (Entered: 10/05/2004)
10/14/2004	●	**AMENDED BRIEFING SCHEDULE** Minute Entry John T. Elfvin : Set Deadlines/Hearing as to 48 MOTION for Summary Judgment:. Responses due by 1/31/2005 Replies due by 2/2/2005. Motion Hearing set for 2/4/2005 03:00 PM before Hon. John T. Elfvin. (JBS,) (Entered: 10/19/2004)
01/13/2005	●	Minute Entry Judge John T. Elfvin : **SECOND AMENDED BRIEFING SCHEDULE**Set Deadlines/Hearing as to 48 MOTION for Summary Judgment, Responses due by 6/3/2005 Replies due by 6/8/2005. Motion Hearing set for 6/10/2005 03:00 PM before Hon. John T. Elfvin. (JBS,) (Entered: 01/13/2005)
05/18/2005	●	Set/Reset Deadlines as to 50 MOTION to Amend/Correct 48 MOTION for Summary Judgment. At request of counsel, new briefing schedule entered. Responses due by 6/15/2005 Replies due by 6/22/2005. Motion Hearing set for 6/24/2005 03:00 PM before Hon. John T. Elfvin. (JBS,) (Entered: 05/18/2005)
06/16/2005	●	NOTICE of MANUAL FILING by Robie J. Drake (JDK,) (Entered: 06/16/2005)

06/16/2005	●52	TRANSCRIPT of EBT of Richard Walter held 7/30/03 filed, maintained in paper form in the Clerk's office (JDK,) (Entered: 06/16/2005)
06/16/2005	●53	TRANSCRIPT of EBT of The Honorable Peter L. Broderick held 8/21/03 filed, maintained in paper form in the Clerk's office (JDK,) (Entered: 06/16/2005)
06/16/2005	●54	TRANSCRIPT of EBT of The Honorable Peter L. Broderick held 11/26/03 filed, maintained in paper form in the Clerk's office (JDK,) (Entered: 06/16/2005)
06/21/2005	●55	REPLY/RESPONSE to re <u>50</u> MOTION to Amend/Correct <u>48</u> MOTION for Summary Judgment filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 06/21/2005)
06/21/2005	●56	AFFIDAVIT of Service for Respondent's Reply Memorandum served on David Gerald Jay, Esq. on June 21, 2005, filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 06/21/2005)
06/24/2005	●	Minute Entry for proceedings held before Judge John T. Elfvin : Motion Hearing held on 6/24/2005 re <u>50</u> MOTION to Amend/Correct <u>48</u> MOTION for Summary Judgment filed by L. A. Portuondo,, <u>48</u> MOTION for Summary Judgment filed by L. A. Portuondo,, Motions Submitted: <u>50</u> MOTION to Amend/Correct <u>48</u> MOTION for Summary Judgment, <u>48</u> MOTION for Summary Judgment. Appearances: David Gerald Jay, Thomas J. Brandt. (Court Reporter kp.) (JBS,) (Entered: 07/20/2005)
06/27/2005	●57	MEMORANDUM in Opposition re <u>48</u> MOTION for Summary Judgment filed by Robie J. Drake. (Attachments: # <u>1</u> Exhibit 1# <u>2</u> Exhibit 2# <u>3</u> Exhibit 3# <u>4</u> Exhibit 4# <u>5</u> Exhibit 5# <u>6</u> Exhibit 6)(JDK,) (Entered: 06/27/2005)
07/22/2005	●58	TRANSCRIPT of Proceedings held on 6/24/05 before Judge John T. Elfvin. Court Reporter: Michelle McLaughlin, pages 1-11, transcript maintained in paper form in the Clerk's office. (JDK,) (Entered: 07/22/2005)
03/17/2006	●59	MEMORANDUM AND ORDER granting <u>50</u> motion for summary judgment and dismissing Petition. Signed by Judge John T. Elfvin on 3/16/06. (RAZ) Clerk to close case. (Entered: 03/17/2006)
03/20/2006	●60	JUDGMENT based on decision by Court. Signed by Clerk of Court, Rodney C. Early on 2/20/06. (DZ,) (Entered: 03/20/2006)
03/21/2006	●61	NOTICE OF APPEAL as to <u>60</u> Judgment by Robie J. Drake. Fee Status: N/A - Court Appointed. (USCA Forms C and D to David G. Jay). (DR,) (Entered: 03/22/2006)
04/05/2006	●62	MANDATE of USCA as to <u>61</u> Notice of Appeal filed by Robie J. Drake, dismissing the appeal without prejudice to the appeal being reinstated upon notice to the Clerk within 30 days from the entry of an order by the district court judge granting or denying a certificate of appealability. Any motions pending prior to the entry of this order of dismissal are deemed moot. (DR,) (Entered: 04/05/2006)

04/10/2006	<u>63</u>	MOTION for Certificate of Appealability by Robie J. Drake.(Jay, David) (Entered: 04/10/2006)
04/11/2006	<u>64</u>	AFFIDAVIT in Opposition re <u>63</u> MOTION for Certificate of Appealability filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 04/11/2006)
04/11/2006	<u>65</u>	AFFIDAVIT of Service for Affirmation in Opposition served on David Gerald Jay, Esq. on April 11, 2006, filed by L. A. Portuondo. (Brandt, Thomas) (Entered: 04/11/2006)
04/11/2006		E-Filing Notification: Attorney Directed to Re-File, Document is Unsigned <u>64</u> AFFIDAVIT (Entered: 04/12/2006)
05/18/2006	<u>66</u>	ORDER denying <u>63</u> Motion for Certificate of Appealability. Signed by Judge John T. Elfvin on 5/16/06. (RAZ) (Entered: 05/18/2006)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

FILED

MAR 20 2008

U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Robie J. Drake,

vs.

**CLERK'S CERTIFICATION
DOCUMENT(S)/RECORD SENT**
Civil/Criminal No: 99-CV-681
USCA No. 06-1365-pr
01-2217

L.A. Portuondo, Superintendent,
Shawangunk Correctional Facility,

I, RODNEY C. EARLY, CLERK of the District Court of the UNITED STATES for the Western District of New York, DO, HEREBY CERTIFY that the foregoing docket entries, with the exception of the documents listed below are maintained electronically on the court's CM/ECF system and constitute the Record on Appeal in the above-entitled action.

Pursuant to the request of the United States Court of Appeals, the original document(s)/record are being sent by mail on March 20, 2008.

Docket # 52, 53 and 54 - TRANSCRIPTS

Docket #

Docket #

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereto affixed at the City of Buffalo, New York, this 20th day of March, 2008.

Rodney C. Early, Clerk
U.S. District Court

s/ Diane Radloff
By: Diane Radloff
Deputy Clerk

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

FILED

2008 APR 14 PM 1:54

U.S. DISTRICT COURT
W.D.N.Y. - BUFFALO

Robie J. Drake,

vs.

L.A. Portuondo, Superintendent,
Shawangunk Correctional Facility,

**FIRST SUPPLEMENTAL
CLERK'S CERTIFICATION
DOCUMENT(S)/RECORD SENT**
Civil/Criminal No: 99-CV-681
USCA No. 06-1365-pr
01-2217

I, RODNEY C. EARLY, CLERK of the District Court of the UNITED STATES for the Western District of New York, DO, HEREBY CERTIFY that the foregoing docket entries, with the exception of the documents listed below are maintained electronically on the court's CM/ECF system and constitute the Record on Appeal in the above-entitled action.

Pursuant to the request of the United States Court of Appeals, the original document(s)/record are being sent by mail on April 14, 2008.

Docket # STATE COURT RECORDS - Five (5) Volumes

Docket #

Docket #

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereto affixed at the City of Buffalo, New York, this 14th day of April, 2008.

Rodney C. Early, Clerk
U.S. District Court

s/ Diane Radloff
By: Diane Radloff
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE DRAKE,

Petitioner,

v.

Docket No. 99-cv-681S

L.A. PORTUONDO,

Respondent.

PLEASE TAKE NOTICE that the petitioner, above named, by his attorney,
David Gerald Jay, respectfully moves for the following relief on a date and time as fixed
by the Clerk of the Court:

1. For an Order permitting the commencement of the trial in the case *People v. Drake*, now pending in the Niagara County Court to be deferred until October 26, 2009.

Dated: Buffalo, New York
February 23, 2009

DAVID GERALD JAY
/s/ David Gerald Jay
Attorney for Petitioner
69 Delaware Avenue - Suite 1103
Buffalo, New York 14202
Tel: (716) 856-6300
Fax: (716) 856-6100
e-mail: davidgjay@verizon.net

AFFIRMATION

DAVID GERALD JAY, an attorney at law, hereby affirms the following,
under the penalties of perjury, pursuant to the provisions of 28 U.S.C. §1746:

1. This case was remanded by the Second Circuit Court of Appeals on January 23, 2009 with directions that the Writ of Habeas Corpus be issued in ninety days, unless the Niagara County authorities took steps to retry Mr. Drake upon the original indictment in his criminal matter leading to his conviction in 1982.

2. Mr. Drake has been returned to Niagara County, counsel has been assigned to him and the Niagara County Court has set a trial date of March 23, 2009.

3. As can be seen from the annexed Stipulation, both the prosecution and the defense require more time to prepare this 25+ year old case for retrial and are jointly requesting a continuance.

4. It is therefore requested that this application be given preference on the Court's calendar so that a speedy determination can be had. Mr. Brandt, representing the Respondent in this proceeding has indicated that he joins in the application.

Dated: Buffalo, New York
February 23, 2009

/s/ David Gerald Jay
David Gerald Jay

STATE OF NEW YORK : COUNTY OF NIAGARA
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

Against

Stipulation

ROBIE J. DRAKE

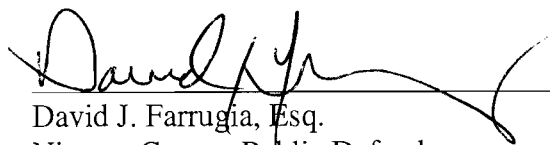
Ind. No. 7205

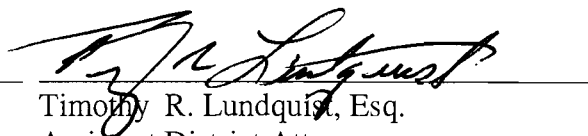
Defendant

We, counsel for the respective parties herein, agree and stipulate as follows:

1. That the United States Circuit Court for the Second Circuit remanded the matter of Robie J. Drake v. L.A. Portuondo, Docket No. 06-1365-pr., for the entry of judgment conditionally granting the writ of habeas corpus sought by Mr. Drake and ordering his release unless the State provides him a new trial within 90 days.
2. That the matter thereafter was returned to the Niagara County Court for retrial.
3. That trial has been scheduled by the Niagara County Court, Hon. Richard J. Kloch, Acting County Court Judge, to commence on March 23, 2009, in compliance with that Order.
4. That the office of the Niagara County District Attorney, having appeared before the court, is prepared to proceed with the trial of this matter on March 23, 2009.
5. That on February 20, 2009, counsel for the Defendant addressed the issue of an extension of the 90 day period to properly prepare a defense in this matter. Judge Kloch indicated that he had no control over any extensions of time and directed counsel to apply to the federal court for further time to prepare.
6. That defense counsel need additional time to review the file, interview witnesses, investigate the circumstances of the allegations, retain the appropriate expert witnesses and prepare the matter for trial.
7. That by this stipulation, the defense counsel agree to be charged for the time delay created by such adjournment.
8. That defense counsel avers that the right of the Defendant to a fair trial requires that defense counsel be granted this additional time to prepare.

9. That the parties agree and request that the court grant an Order for an additional 6 months from the end of the 90 day period for the commencement of the trial.


David J. Farrugia, Esq.
Niagara County Public Defender
Attorney for Robie J. Drake

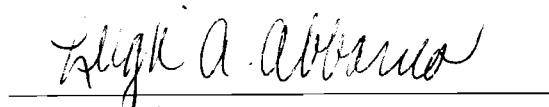

Timothy R. Lundquist, Esq.
Assistant District Attorney
for Niagara County

On this 20th day of February, 2009, appeared before me, David J. Farrugia, Esq., Public Defender for Niagara County, who did execute the foregoing Stipulation in my presence.


Notary Public

LAURA G. ZEMSZAL #4656194
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires 1-31-2010

On this 20th day of February, 2009, appeared before me, Timothy R. Lundquist, Esq., Assistant District Attorney for Niagara County, who did execute the foregoing Stipulation in my presence.


Notary Public

Leigh A. Abbarno
Notary Public, State of New York
Qualified in Niagara County
Commission Expires 1/2/10
Reg. No. 01AB6192602

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the annexed defendant's Notice of Motion and Affirmation with the Clerk of the District Court using its CM/ECF System which would then electronically notify the following CM/ECF participant in this case:

Thomas H. Brandt, Esq.

/s/ David Gerald Jay
David Gerald Jay

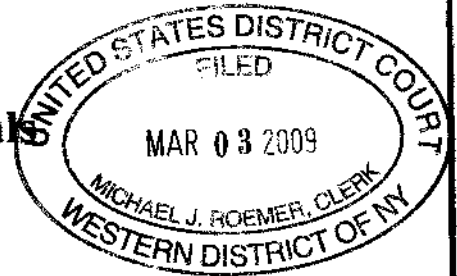
Dated: Buffalo, New York
February 23, 2009

MANDATE

W.D.N.Y. (BUFFALO)
99-cv-081
E.H.N.J.

United States Court of Appeals

FOR THE
SECOND CIRCUIT



JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of January, two thousand nine,

Before:

Hon. Dennis Jacobs,
Chief Judge,
Hon. Amalya L. Kearse,
Hon. Rosemary S. Pooler,
Circuit Judges.



ROBIE J. DRAKE,

Petitioner-Appellant,

-v.-

Docket No. 06-1365-pr

L.A. PORTUONDO,
Superintendent, Shawangunk Correctional Facility,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

ON CONSIDERATION THEREOF, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the district court is REVERSED and REMANDED in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by

Joy Fallek
Administrative Attorney

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by
DEPUTY CLERK

ISSUED AS MANDATE:

24 2009

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

v.

ORDER
99-CV-681S

L.A. PORTUONDO,

Respondent.

1. On January 23, 2009, the United States Court of Appeals for the Second Circuit reversed the Court's (Elfvig, J.) denial of Petitioner's petition for writ of habeas corpus, and directed this Court to enter judgment conditionally granting Petitioner's writ of habeas corpus and ordering Petitioner's release unless the State of New York provides him a new trial within 90 days. See Drake v. Portuondo, 553 F.3d 230, 247-48 (2d Cir. 2009). The Mandate was filed on March 3, 2009. (Docket No. 74.)

2. Approximately one week before the Mandate was filed, Petitioner filed a motion seeking this Court's permission to adjourn Petitioner's new trial, which the Niagara County Court has scheduled to begin on March 23, 2009, until October 26, 2009. (Docket No. 73.) Although the State is prepared to begin on March 23, Petitioner requests additional time to prepare for trial. The State does not object to this request.

3. The Second Circuit explicitly directed the "entry of judgment conditionally granting the writ of habeas corpus and ordering Drake's release unless the State provides him a new trial within 90 days." Drake, 553 F.3d at 248. Entering judgment accordingly is all this Court is empowered to do. Any requests for extensions of time or a stay of the Second Circuit's Order must be made to the Second Circuit. See, e.g., Fed. R. App. P.

26(b) ("For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires.").

Petitioner's motion will therefore be denied.

IT HEREBY IS ORDERED, that pursuant to the Second Circuit's Mandate (Docket No. 74), Petitioner's Petition for Writ of Habeas Corpus is CONDITIONALLY GRANTED and Petitioner is ORDERED released unless the State provides him a new trial within 90 days.

FURTHER, that Petitioner's Motion seeking an extension of time (Docket No. 73) is DENIED.

FURTHER, that the Clerk of the Court is DIRECTED to enter judgment accordingly.

SO ORDERED.

Dated: March 4, 2009
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

UNITED STATES DISTRICT COURT

for the
Western District of New York

Robbie Drake

Plaintiff

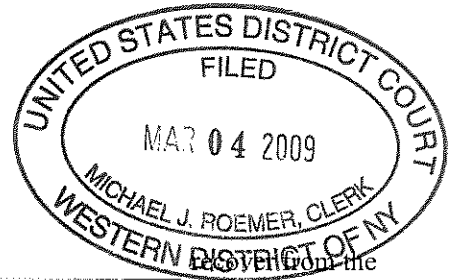
v.

L.A. Portuondo

Defendant

Civil Action No. 99-CV-681

JUDGMENT IN A CIVIL ACTION



The court has ordered that (check one):

- ☐ the plaintiff (name) _____ recover from the defendant (name) _____ the amount of _____ dollars (\$ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.
- ☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____ recover costs from the plaintiff (name) _____

- ☒ other: pursuant to the Second Circuit's Mandate, petitioner's petition for writ of habeas corpus is conditionally granted and petitioner is ordered released unless the State provides him a new trial within 90 days. Petitioner's motion seeking an extension of time is denied, and the Clerk is directed to enter judgment accordingly.

This action was (check one):

- ☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.
- ☐ tried by Judge _____ without a jury and the above decision was reached.
- ☐ decided by Judge _____ on a motion for

CLERK OF COURT

Date: 03/04/2009

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Robie J. Drake,

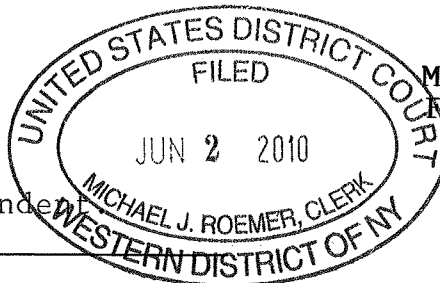
Docket No. 99-cv-681(S)

petitioner,

-v-

L.A. Portuondo,

respondent



MOTION FOR RELIEF
Fed.R.Civ.P. 60(b)(6)

PLEASE TAKE NOTICE, that Robie J. Drake, the petitioner above-named, acting pro se, respectfully moves this Court for the following relief on a date and time as fixed by the Clerk of the Court:

For an Order permitting the reopening of the judgment in this action pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and amending said judgment to grant the writ of habeas corpus unconditionally and ordering the petitioner discharged from custody forthwith, upon the ground that the extraordinary circumstances of this case warrant the relief sought because petitioner's continued confinement is in violation of his right to be free from double jeopardy under the Fifth Amendment of the United States Constitution, the double jeopardy issue has been exhausted in the state courts, the state courts clearly erred by concluding that petitioner's double jeopardy rights were not violated by the prosecutor's deliberate and egregious misconduct, and petitioner's continued confinement is unjust, unlawful and warrants the extraordinary relief sought herein.

This motion is based upon the annexed affidavit of the petitioner, above-named, the exhibits attached thereto, the memorandum of law submitted herewith, and upon all of the papers, pleadings and other records on file in this action.

Dated: May 29, 2010,
Lockport, New York.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robie J. Drake".

Robie J. Drake,
petitioner, pro se
Niagara County Jail
5526 Niagara St. Ext.
P.O. Box 496
Lockport, New York 14094

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Robie J. Drake,

Docket No. 99-cv-681(S)

petitioner,

-v-

L.A. Portuondo,

AFFIDAVIT IN SUPPORT
OF MOTION FOR RELIEF
Fed.R.Civ.P. 60(b)(6)

respondent.

STATE OF NEW YORK)
) ss.:
COUNTY OF NIAGARA)

Robie J. Drake, being first duly sworn, deposes and says:

1. I am the petitioner in the above-captioned action and the facts stated herein are true to my own knowledge, except as to those matters which are alleged upon information and belief, and as to those matters I believe them to be true.

2. I make this affidavit in support of a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The extraordinary circumstances in this case require that the judgment entered in this action be reopened and amended to grant the writ of habeas corpus unconditionally to discharge the petitioner from custody, and no other grounds under Rule 60(b), and no other procedure, is available to grant this relief that law and justice requires.

3. In particular, as more fully set forth below, and in the memorandum of law submitted herewith, the extraordinary circumstances of this case warrant the relief sought herein

because petitioner's continued confinement is in violation of his right to be free from double jeopardy under the Fifth Amendment of the United States Constitution; the grounds presented in this motion have been exhausted in the New York State courts; the failure to grant the relief sought herein will result in the continued confinement of petitioner, who has already been imprisoned almost 29 years; and because the state courts should have dismissed the indictment and freed petitioner on his petition for a writ of prohibition on double jeopardy grounds, petitioner's continued imprisonment is unjust, unlawful and warrants the relief sought herein.

Legal History

4. This case involves a petition for habeas corpus relief under 28 U.S.C. § 2254, attacking as unconstitutional a judgment of the New York State County Court, Niagara County, entered on December 1, 1982, which convicted me of two counts of second degree murder (Penal Law § 125.25[1]), and sentenced me to consecutive terms of 20-years-to-life. The judgment was affirmed on appeal (see, People v. Drake, 129 A.D.2d 963 [4th Dept. 1987]). I have been incarcerated since my arrest in this matter on December 6, 1981.

5. After doing research while imprisoned, I move to vacate judgment, pursuant to N.Y. Criminal Procedure Law § 440.10(1), on the grounds that the prosecution's expert witness on psychological profiling committed perjury, and that the prosecutor knew, or should have known, the testimony was false. County

Court denied the motion without an evidentiary hearing. That decision was affirmed on appeal (see, People v. Drake, 256 A.D.2d 1159 [4th Dept. 1998]).

6. After exhausting state remedies, I filed for federal habeas corpus relief. On March 16, 2001, this Court (Hon. John T. Elfvin, SUSDJ), dismissed my petition without a hearing or discovery (see, Docket No. 22).

7. The United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case for discovery and, if necessary, a hearing to permit me to develop the record on the issue of whether the prosecutor knew or should have known that their expert on psychological profiling, Richard D. Walter, was committing perjury (see, Drake v. Portuondo, 321 F.3d 338 [2003]).

8. In its decision, the Court of Appeals made the following findings:

a. That Richard D. Walter was a "charlatan," who perjured himself regarding his qualifications, and his testimony was "medically speaking, nonsense". Id., 321 F.3d at 340, 342, 346.

b. That the syndrome introduced by Walter, dubbed "picquerism," is referenced nowhere but in a true-crime paperback. Id., 321 F.3d at 340.

c. That the sole issue at the trial was whether the prosecution could prove the intent requisite for second degree murder. Id., 321 F.3d at 341.

d. That the prosecutor ambushed the defense with the bogus expert, advising the defense of its intent to call Walter only the day before he testified, and successfully opposed the defense request for a continuance. Id., 321 F.3d at 342.

e. That Walter's highly prejudicial testimony was intended to bolster what the prosecutor perceived as a significant weakness in his case--the evidence supporting his theory of intent. Id., 321 F.3d at 342, 346.

f. That petitioner diligently sought to develop the factual basis underlying the perjury issue but was prevented by the state court from doing so. Id., 321 F.3d at 347.

9. On remand, depositions were taken of Peter L. Broderick and Richard D. Walter. The district court (Elfvin, J.) did not hold a hearing, but found that the prosecutor was not aware of Walter's perjury, and once again dismissed the petition for habeas corpus (see, Docket No. 59).

10. The Court of Appeals conducted a de novo review of the district court's legal and factual findings and found that the district court "committed clear error in reaching its findings with respect to Broderick's knowledge of Walter's false testimony" Drake v. Portuondo, 553 F.3d 230, 247 (2009).

11. The Court of Appeals made the following findings upon its review of the record:

a. Again, that the only issue at trial was whether the defendant "had the intent requisite for second degree murder."

Id., 553 F.3d at 234.

b. That Walter's false testimony went directly to the issue of intent and that other evidence of intent was not conclusive. Id., 553 F.3d at 234, 247.

c. That the jury's "estimate of the truthfulness" of Walter's testimony may well have been determinative of the single issue at trial because Walter's concocted theory filled the gap in the prosecution's theory of intent. Id., 553 F.3d at 245.

d. That Walter's perjured testimony consisted of gross exaggerations and outright lies regarding his credentials. Id., 553 F.3d at 238.

e. That Walter further testified falsely about conversations between himself and the prosecutor, Mr. Broderick, as well as the timing of those conversations prior to trial. Id., 553 F.3d at 242, 244.

f. That prosecutor Broderick knew these portions of Walter's testimony were false because the falsehood related to conversations he himself had with Walter. Id., 553 F.3d at 242.

g. That the record strongly suggests Broderick knew that Walter's testimony was intentionally misleading, and thus crafted his questions to achieve literal accuracy while conveying the false impression that Walter's work had been validated through publication. Id., 553 F.3d at 243.

h. That Walter had two weeks to conjure up his quackery and adapted the symptoms of the syndrome to remedy any potential weakness in the prosecution's theory. Yet Walter lied about

how much time he had to consider the facts of the case and whether the case was difficult to determine.

"Thus, the supposed brevity of Walter's contact with the facts of this case was perhaps the strongest reason for the jury to conclude that Walter was not fabricating this sophisticated story." Id., 553 F.3d at 244.

But prosecutor '[B]roderick knew, however, the truth was quite different." Id., 553 F.3d at 244.

i. Furthermore, prosecutor Broderick engaged in conduct designed to inhibit the defense from gathering information to rebut or expose Walter's falsehoods. Id., 553 F.3d at 235, 244-245. The Court of Appeals found:

"... there was inferential support for the conclusion that Broderick knowingly elicited Walter's false statements. The prosecutor's decision to spring Walter's testimony at the last minute and resist a continuance provided circumstantial evidence of the prosecutor's knowing complicity in the false testimony ..." Ibid, 553 F.3d at 243 (emphasis supplied)

j. The materiality of Walter's testimony was "virtually conceded" by the prosecutor, who acknowledged "that he called Walter to compensate for problems revealed with his theory of the case after it turned out that there was no evidence of semen in Smith's rectal cavity. Walter's testimony filled the gap in the prosecution's theory of intent with a sensationalistic and pseudo-scientific explanation of motive." Id., 553 F.3d at 245.

12. Broderick acknowledged that Walter was brought in to fill an important gap in his case, explaining, "When I lost that evidence which I thought in my own conventional mind was the evidence I sought or would need to prove the sexual assault. I had to look elsewhere and I consulted with [Walter]" (Trial Transcript at 750, quoted at 553 F.3d 235).

13. The absence of rectal sperm evidence was not the only evidentiary setback which preceded Broderick's decision to put a bogus expert on the stand. The prosecution's evidence of post-mortem bitemarks--from the testimony of Dr. Justin Uku and Dr. Lowell Levine--was effectively rebutted by the defense on cross-examination. Dr. Uku acknowledged that the "... lack of broken blood vessels could also indicate a pre-mortem trauma that was not severe ..." and Dr. Levine ... was not a pathologist and the basis for his opinion was Dr. Uku's examination." (Drake v. Portuondo, supra, 553 F.3d at 246 [emphasis supplied]).

14. The timing of Broderick's misconduct in willfully using false testimony and foreclosing the defense from any meaningful opportunity to discover it in time to act is also significant. The misconduct was preceded by evidentiary setbacks regarding proof of an alleged sexual assault that the prosecutor believed crucial to his case. Walter was the last witness for the prosecution. The petitioner had already endured almost the entirety of the prosecution's case and bulk of the trial.

15. The facts and circumstances preceding and surrounding Broderick's egregious prosecutorial misconduct by knowingly offering Walter's perjured testimony and manipulating the court to prevent the defense from discovering it gives inferential support to conclude that Broderick engaged in such misconduct to avoid an acquittal on the intentional murder charges which he believed likely to occur in the absence of Walter's false, extremely prejudicial testimony (see, Drake v. Portuondo, 321 F.3d 338, 346 [2003], "... the jury was likely to be impressed (if not inflamed) by testimony that the defendant was a "picquerist" who killed, mutilated, and abused his victims to satisfy a warped sexual urge.").

16. For these reasons, petitioner respectfully submits that retrial in this matter violates petitioner's right against double jeopardy under Oregon v. Kennedy, 456 U.S. 667 (1982).

17. That pursuant to the conditional writ of habeas corpus granted by the Court of Appeals in this case, the Niagara County District Attorney caused the petitioner to be transferred from state custody to the custody of the Niagara County Sheriff on February 4, 2009.

18. That on February 6, 2009, petitioner was brought before New York State Supreme Court, Niagara County, Hon. Richard C. Kloch Sr., for a status conference. Because petitioner was, and remains, indigent the Niagara County Public Defender was assigned to represent me. Due to scheduling constraints, and to comply with the 90-day retrial Order, Justice Kloch

scheduled the retrial to commence on March 23, 2009.

19. That on or about March 20, 2009, the Court of Appeals granted permission to extend the period within which to retry the case. Thereafter, Justice Kloch set a new trial date for October 5, 1982.

20. That by Order to Show Cause granted by Hon. Jerome C. Gorski, on March 23, 2009, petitioner, by his assigned counsel, commenced an Article 78 proceeding in the New York State Supreme Court, Appellate Division, Fourth Department, seeking, inter alia, a writ of prohibition to bar a retrial in this matter on double jeopardy grounds. The moving papers are annexed hereto as: Order to Show Cause-Exhibit A; Petition-Exhibit B; Affidavit of David Farrugia, assigned counsel-Exhibit C.

21. That counsel for the respondent in this matter, Thomas H. Brandt, appeared in the prohibition proceeding and filed opposing papers, which are annexed hereto as: Answer-Exhibit D; Affidavit of Thomas Brandt-Exhibit E.

22. That by Memorandum and Order entered April 7, 2009, the Appellate Division, Fourth Department, denied and dismissed petitioner's application, holding:

"Petitioner has not demonstrated that the alleged prosecutorial misconduct in his case was conducted in a deliberate attempt to provoke him to move for a mistrial (cf. Matter of DeFilippo v Rooney, 11 N.Y.3d 775, 776 [2008]; Matter of Gorghon v DeAngelis, 7 N.Y.3d 470, 473-474 [2006]). Petitioner was therefore not denied the right to have his trial completed by a particular tribunal (see Matter of DeCanzio v Kennedy, 88 A.D.2d 770, 771 [1982], lv denied 57 N.Y.2d 601 [1982])."

(See Exhibit F, unpublished memorandum decision)

23. That petitioner's assigned counsel filed both a timely notice of appeal to the New York Court of Appeals, claiming an appeal of right on constitutional grounds, and an application for leave to appeal (see, Exhibit G-Notice of Appeal; Exhibit H-Leave Application).

24. On September 1, 2009, the New York Court of Appeals dismissed petitioner's appeal to that court, and denied him leave to appeal (see, Drake v. Kloch, et al., 13 N.Y.3d 755, 886 N.Y.S.2d 90, 914 N.E.2d 1008).

25. That during July 2009, petitioner's family, with funds of their own, retained Andrew C. LoTempio, Esq., to represent me in the pending retrial before Supreme Court, Niagara County. Mr. LoTempio, a solo practitioner, has his office address at: 227 Niagara Street, Buffalo, New York 14201.

26. That petitioner worked closely and continuously with Mr. LoTempio to prepare the case for retrial, scheduled for October 5, 2009. Petitioner consulted with counsel, furnished him with extensive documentation regarding the case (including numerous police and laboratory reports obtained after the first trial through Freedom of Information Law [FOIL] requests). Petitioner also assisted counsel with legal research on the myriad of complex issues involved in retrying the case after 27 years, including: lost or destroyed evidence; deceased or "unavailable" witnesses; exclusion of evidence of uncharged crimes; exclusion of novel/unreliable expert testimony and redaction of irrelevant, prejudicial content from evidentiary statements.

27. That because additional time was needed by petitioner's counsel to prepare the case for retrial, a second extension was sought and granted by the Court of Appeals. The scheduled date for retrial was ultimately set for March 8, 2010. A jury trial before Justice Kloch commenced on that date. On March 23, 2010, the jury returned a verdict of guilty on both counts of second degree murder.

Relief Sought

28. That petitioner now moves this Court for an Order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, reopening the judgment in this action and amending said judgment to grant the writ of habeas corpus unconditionally on the grounds that the retrial violated the double jeopardy clause of the Fifth Amendment of the United States Constitution.

29. That the prosecutor at petitioner's first trial intentionally engaged in egregious prosecutorial misconduct by knowingly offering the false testimony of Richard Walter; manipulated the trial court to prevent defense counsel from discovering the falsehood in time to act; and did so to prevent an acquittal of the intentional murder charges which the prosecutor believed likely to occur in the absence of Walter's perjured testimony, thereby entitling petitioner to the double jeopardy protection under Oregon v. Kennedy, supra.

30. That petitioner has presented and exhausted his double jeopardy claim in the New York State courts by seeking a writ

of prohibition pursuant to Article 78 of the Civil Practice Law and Rules. Under New York law, the writ of prohibition is the proper proceeding to raise the double jeopardy challenge (see generally, Kraemer v. County Ct. of Suffolk Co., 6 N.Y.2d 363 [1959]; Matter of DiLorenzo v. Murtagh, 36 N.Y.2d 306 [1975]; Johnson v. Morgenthau, 69 N.Y.2d 148 [1987]).

31. That the question of whether retrial is improper under the constitutional principle of double jeopardy must be determined in the first instance by the state courts in order to satisfy the exhaustion requirements of 28 U.S.C. § 2254(b) (see, DiSimone v. Phillips, 518 F.3d 124 [2d Cir. 2008]).

32. That the Appellate Division, Fourth Department's disposition of petitioner's double jeopardy claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" (28 U.S.C. § 2254[d][2]), and resulted in a decision that involved "an unreasonable application of... clearly established Federal law ..." (28 U.S.C. § 2254[d][1]).

33. The extraordinary circumstances of this case require that the judgment herein be reopened and amended to grant the writ of habeas corpus unconditionally, and no other procedure is available to grant this relief that law and justice require because:

a. There was no mistake, inadvertence or excusable neglect within the meaning of Rule 60(b)(1);

- b. The motion is not based upon newly discovered evidence within the meaning of Rule 60(b)(2);
- c. There was no fraud or misconduct within the meaning of Rule 60(b)(3);
- d. There is no claim the judgment is per se void because the jurisdiction of the court to determine the matter is unquestioned. Rule 60(b)(4) is therefore patently inapplicable; and
- e. There is no underlying judgment that has been set aside, nor is the determination made in the court's judgment the type of judgment that has prospective application within the meaning of Rule 60(b)(5).

34. That the double jeopardy issue petitioner now raises is explicitly interwoven with the perjury claim that caused the Second Circuit to grant and approve the conditional writ.

35. That the petitioner is herein seeking to obtain the relief to which he would have been entitled originally had the double jeopardy issue been properly before the Court of Appeals (see, DiSimone v. Phillips, supra). However, at the time petitioner raised his perjury claim in the state courts, he was not then aware of all the material facts surrounding Broderick's knowing use of Walter's false testimony, and the state courts improperly denied petitioner the opportunity to fully develop the record with the facts concerning the perjury claim (see, Drake v. Portuondo, supra, 321 F.3d at 347). Had petitioner been allowed to adequately develop the record during

the state court proceedings petitioner could have raised, and the state courts could have addressed, the perjury and double jeopardy issues in the first instance.

36. That because the double jeopardy issue is explicitly interwoven with the perjury claim upon which the Court of Appeals granted habeas relief, it would be inappropriate to direct petitioner to file another petition for habeas relief. If petitioner were to file another petition for habeas corpus attacking the Appellate Division's judgment on the double jeopardy claim, the State would undoubtedly argue that any future petition attacking the judgment to be imposed by the Supreme Court, Niagara County, upon the March 23, 2010, verdict convicting petitioner of two counts of second degree murder, would count as a second or successive petition, requiring petitioner to obtain permission to file a second or successive petition from the Court of Appeals, and meeting the high hurdles imposed by AEDPA for doing so.

37. That even if this Court were to indicate that it would recharacterize this Rule 60(b)(6) motion as a petition for habeas corpus under 28 U.S.C. § 2254, this motion/petition should not count as "first" petition attacking the judgment of conviction resulting from the second trial in March 2010 under Vasquez v. Parrott, 318 F.3d 387 (2d Cir. 2002). While this motion certainly concerns the same arrest and the same criminal charges, it only challenges the decision and order of the Appellate Division which rejected petitioner's double

jeopardy claim and allowed him to be retried under the same indictment. Importantly, the state courts have considered and rejected petitioner's double jeopardy challenge on the merits. Further attempts to argue or reargue the issue before any state court would be futile.

38. The double jeopardy claim is unquestionably a cognizant, constitutional ground for relief under the Fifth Amendment of the United States Constitution, before a federal habeas court. It is also unquestionable that if petitioner's double jeopardy claim is successful before this Court he would be entitled to immediate, unconditional release from custody. Under the facts and circumstances of this case, it would be unjust and inappropriate to recharacterize this motion as a "first" habeas petition against the judgment to be imposed from the March 23, 2010 convictions, and ask petitioner to forfeit the one full opportunity to seek collateral review that every prisoner is ensured of--in the event that it becomes necessary; or in the alternate, require the petitioner, who has already been imprisoned for 28½ years on an unjust conviction, to wait until his direct appeal (and any potential collateral attacks that may be filed in the state courts) are exhausted until petitioner can challenge the Appellate Division's judgment dismissing his prohibition petition which raised his double jeopardy claim and challenged the jurisdiction of the state courts to continue to prosecute and imprison him. By way of reference, petitioner waited approximately five years

for his previous direct appeal to be completed in the state courts, and waited another four years for his post-conviction CPL § 440 motion, concerning the prosecutor's knowing use of Walter's perjured testimony, to be exhausted in the state courts.

39. That even if petitioner's state court appeal (or any collateral attack he may file in the state courts) is successful, it would still not moot or render academic the relief sought in this motion. Because the New York State courts have rejected petitioner's double jeopardy claim on the merits, the only relief petitioner can expect to obtain is a reversal of his convictions and a remand for yet a third trial. Without question, such proceedings cause petitioner anxiety, uncertainty and extreme hardship. It is for that further reason that this motion should not be recharacterized as a "first" petition attacking the finality of the judgment to be imposed for the March 23, 2010 convictions, but construed as only attacking the Appellate Division's judgment in the Article 78 proceeding which dismissed petitioner's double jeopardy claim (see, Vasquez v. Parrott, supra, 318 F.3d at 390-391).

40. That there is no jurisdictional impediment to this Court's plenary consideration of this motion. While this Court "... must adhere to the decision and mandate of the ..." Second Circuit, "... there is the corollary that upon remand the trial

court may consider matters not expressly or implicitly part of the decision of the court of appeals. * * * This is true also at a later stage in the litigation where the case is again before the trial court not on remand but, for example, on a new motion to vacate judgment." United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977) (citation omitted); see also DeWeerth v. Baldinger, 38 F.3d 1266, 1270 (2d Cir. 1993), "[T]he district judge would not be flouting the existing mandate by acting on the motion since the appellate decision related only 'to the record and issues then before the court, and [did] not purport to deal with possible later events.' 429 U.S. at 18." (quoting Standard Oil Co. v. United States, 429 U.S. 17 [1976]).

41. The double jeopardy issue was never briefed and argued before the Court of Appeals in this case, and was not within the scope of the mandate issued by that Court. Although the relief sought herein is entirely consistent with the decision of the Court of Appeals--indeed, the double jeopardy claim is predicated on the findings of fact it made after the remand--the question of whether the prosecutorial misconduct barred a retrial under Oregon v. Kennedy, supra, was not ruled upon, and under the authority of DiSimone v. Phillips, supra, the Second Circuit would not have addressed the issue because the state courts had yet to rule on the question. The double jeopardy issue presents this Court with a matter that was neither expressly or implicitly part of the Second Circuit's decision, and is properly before this Court for

a determination on the merits.

42. That this motion is brought within a reasonable time under the facts and circumstances of this case. Petitioner did not learn of the New York Court of Appeals disposition of his Article 78 prohibition appeal on the double jeopardy issue until approximately the third week of September. At that time petitioner was laboring with new counsel to prepare the case for an October trial date, and petitioner had to devote the entirety of his law library time to researching the myriad of complex issues involved in this case (as previously discussed) to aid counsel, a solo practitioner, to prepare the case for retrial.

43. Further, that petitioner could not anticipate the second extension granted by the Court of Appeals with which to retry the case and had to work diligently to prepare for retrial at an earlier date than the one ultimately settled on. Moreover, the motion is brought within a year of the New York Court of Appeals dismissal of petitioner's appeal in the double jeopardy proceeding. Petitioner further believes it is brought within the stipulated period with which to retry the case, as granted by the Second Circuit.

44. That the relief sought herein is clearly warranted and will serve the ends of substantial justice.

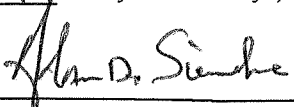
45. The trial prosecutor, Peter Broderick, malevolently elicited Richard Walter's false and inflated credentials and

mislead both the trial court and defense counsel to conceal the truth he knew about his bogus expert. The misconduct was undertaken to prevent an acquittal on the intentional murder charges that Broderick believed at the time was likely to occur in the absence of his misconduct, due to the "loss" of the rectal sperm evidence, and petitioner's successful efforts to rebut the state's experts opinions as to alleged post-mortem bite marks through his properly asserted right to cross-examination. In so poisoning the petit jurors minds with a fictional, sensationalistic "syndrome" by a phoney expert he knew was committing perjury, and doing so to fend off an acquittal he believed likely, Broderick subverted petitioner's valued right to have his trial completed by a particular tribunal and the retrial and continued confinement of the petitioner in this matter violates his Fifth Amendment right to be free from double jeopardy under the rule of Oregon v. Kennedy, supra.

WHEREFORE, the above-stated reasons, petitioner Robie J. Drake asks this Court to grant relief under Rule 60(b)(6), reopen and amend the judgment to grant the writ of habeas corpus unconditionally, discharge petitioner from custody, and grant such other and further relief as this Court may deem just and proper.


Robie J. Drake

Sworn to before me this
29 day of May, 2010.


Notary Public

ADAM D. SIEMUCHA
NOTARY PUBLIC
STATE OF NEW YORK
QUALIFIED IN NIAGARA COUNTY
MY COMMISSION EXPIRES DEC. 14, 2011

EXHIBIT - A

At a Special Term of the Supreme Court of
the State of New York, Appellate Division,
Fourth Judicial Department, held at Buffalo,
New York on the 23 of March, 2009.

PRESENT: HON. JEROME C. GORSKI

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

ROBIE J. DRAKE,

Petitioner

against

ORDER TO SHOW CAUSE

Index No.

HONORABLE RICHARD C. KLOCH, SR.,
an Acting Justice of the Supreme Court of the State
of New York, Niagara County,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

Upon the annexed Petition of Robie J. Drake, verified the 17th day of March,
2009, the poor person application of the Petitioner dated March 17, 2009, the affidavit of
David J. Farrugia, dated March 17, 2009, and all attachments thereto, and upon all the
proceedings heretofore had herein, it is hereby

ORDERED, that the respondents herein show cause before this Court at a
Term thereof to be held ~~at the Chambers of the Honorable Jerome C. Gorski,~~
~~Associate Justice of the Appellate Division of the Supreme Court of the State of New~~
~~York, 50 Delaware Avenue, Buffalo, New York 14202,~~ on the 6th of APRIL, 2009 at
EAST ROCHESTER 14604

10⁰⁰ o'clock on that day, or as soon thereafter as counsel may be heard, why an Order should not be made and entered herein:

a. Prohibiting the People of the State of New York from prosecuting a criminal action entitled People of the State of New York v. Robie J. Drake, pending in Supreme Court, Niagara County under Indictment No. 7205 upon the grounds that such prosecution constitutes a violation of Respondent's constitutional rights under the Double Jeopardy clause of the United States Constitution and the New York State Constitution; and

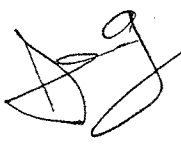
b. Dismissing the indictment based upon the circumstances of this case;

c. Alternatively, for an Order of this Court prohibiting the People from offering at trial any evidence of intent with respect to the charged crimes of Murder in the Second Degree; and

d. Granting the Petitioner poor person status to the extent of waiving the filing fee imposed by CPLR 8022(b) and

e. For such other and further relief as this Court deems appropriate under the circumstances herein; and

The Petitioner having shown good cause therefore, it is hereby

 **ORDERED**, that pending the determination of this proceeding or until further Order of this Court, the trial of the defendant on Niagara County Indictment 7205 is hereby stayed; and it is further

ORDERED, that the Petitioner is granted Poor Person Status to the extent of
waiving the filing fee pursuant to CPLR 8022, and it is further

ORDERED, that service of a copy of this Order along with a copy of the papers
upon which it is granted be made on or before the 27 day of March, 2009.

Dated: March ²³, 2009
Buffalo, New York

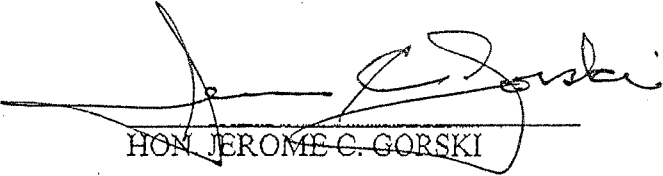

HON. JEROME C. GORSKI

EXHIBIT - B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

ROBIE J. DRAKE,

Petitioner

against

PETITION

Index No.

HONORABLE RICHARD C. KLOCH, SR.,
an Acting Justice of the Supreme Court of the State
of New York, Niagara County,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

STATE OF NEW YORK)
COUNTY OF NIAGARA) ss:

The Petition of Robie J. Drake, respectfully shows:

1. That I am the Petitioner in the above captioned proceeding as such I am fully familiar with the facts and circumstances of this case; I make this affidavit of my own knowledge in support of my application for an Order of this Court granting the following relief:

a. Prohibiting the People of the State of New York from re-prosecuting me on this indictment upon the grounds that such trial would constitute a violation of my constitutional rights under the Double Jeopardy clause of the United States Constitution and the New York State Constitution; and

b. Dismissing the indictment based upon the extraordinary circumstances of this case; or

c. Alternatively, and based upon the same facts and circumstances for which I request the alternative relief, an Order of this Court prohibiting the People from offering at trial any evidence of intent with respect to the charged crimes of Murder in the Second Degree; and

d. For such other and further relief as this Court deems appropriate under the extraordinary circumstances herein.

LEGAL HISTORY

2. I was convicted in 1982 of two counts of second degree murder and sentenced to two consecutive terms of 20 years to life. The conviction was affirmed on appeal. See, *People v. Drake*, 129 AD2d 963 [4th Dept., 1987]. I have been incarcerated since my arrest in this matter.

3. After doing research while incarcerated, I filed a motion to vacate the judgment of conviction on the grounds that the People's expert testified falsely and that the prosecutor knew or should have known that the testimony was false. The Honorable Amy J. Fricano denied without a hearing my motion to vacate the judgment pursuant to Criminal Procedure Law Article 440. That decision was affirmed on appeal. See, *People v. Drake* 256 AD2d 1159 [4th Dept., 1998].

4. After exhausting state remedies, I filed for federal *habeas corpus* relief on those same grounds. On March 16, 2001, the United States District Court for the Western

District of New York (Elfvig, S.D.J.) dismissed my petition for a writ of habeas corpus i without a hearing. See, *Drake v. Portuondo*, 99-CV-0681E(SR), 2001 WL 266021.

5. The United States Court of Appeals, Second Circuit, vacated the District Court's Order and remanded the matter for discovery and, if necessary, a hearing to permit me to develop the record on the issue of whether the prosecutor knew or should have known that their expert, Richard D. Walter, was committing perjury. *Drake v. Portuondo*, 321 F3d 338 [2003].

6. In its decision, the Second Circuit found that because the state habeas court summarily denied the CPL 440.10 motion without a hearing, and because the Appellate Division affirmed on that incomplete record, there were no findings of fact requiring deference. *Drake v. Portuondo*, 321 F3d 338 at pg 345.

7. The Court thus made the following findings:

a. That Richard D. Walter's testimony regarding his qualifications was perjured, that Walter was a "charlatan" and that his testimony was "medically speaking, nonsense". *Drake v. Portuondo*, 321 F3d 338 at pg 340, 342, 346.

b. That the syndrome, dubbed "picquerism" is referenced nowhere but in a true-crime paperback. *Drake v. Portuondo*, 321 F3d 338 at pg 340.

c. That sole issue at trial was whether the People could prove the intent requisite for second degree murder. *Drake v. Portuondo*, 321 F3d 338 at pg 341.

d. That Walter's highly prejudicial testimony was intended to bolster what the prosecutor perceived as significant weakness in the evidence supporting its theory of intent. *Drake v. Portuondo*, 321 F3d 338 at pg 342, 346.

e. That the prosecutor sprang the expert on the defense the day before he testified and successfully opposed the defense request for a continuance. *Drake v. Portuondo*, 321 F3d 338 at pg 342.

f. That your deponent diligently sought to develop the factual basis underlying the habeas corpus petition, but was prevented by the state court from doing so. *Drake v. Portuondo*, 321 F3d 338 at pg 347.

8. On remand, depositions were taken of Peter L. Broderick and Richard D. Walter. The district court did not hold a hearing but found that the prosecutor was not aware of Walter's false statements and that the false testimony was not material to the jury's verdict. *Drake v. Portuondo*, No. 99 Civ. 0681 [W.D.N.Y. March 16, 2006].

9. The United States Court of Appeals, Second Circuit, conducted a de novo review of the district court's legal and factual findings, and found that the district court "committed clear error in reaching its findings with respect to Broderick's knowledge of Walter's false testimony...." *Drake v. Portuondo*, 553 F3d 230, 247 [2009].

10. The Court reversed the decision of the district court and remanded for entry of a judgment conditionally granting the writ of habeas corpus and ordering Drake's release unless a new trial was held within 90 days. *Drake v. Portuondo*, 553 F3d 230, at pg. 247-248.

11. The Court thus made the following findings upon its review of the record:

a. That the only question at trial was whether the defendant had the intent to commit murder; *Drake v. Portuondo*, 553 F3d 230, at pg. 234.

b. That the perjured expert testimony went directly to the issue of intent and that other evidence of intent was not conclusive. *Drake v. Portuondo*, 553 F3d 230, at pg. 234, 247.

c. That the jury's "estimate of the truthfulness" of Walter's testimony may well have been determinative of that single issue at trial because Walter's concocted theory filled the gap in the prosecution's theory of intent. *Drake v. Portuondo*, 553 F3d 230, at pg. 245.

d. That the expert's false testimony consisted of gross exaggerations and outright lies regarding his credentials. *Drake v. Portuondo*, 553 F3d 230, at pg. 238.

e. That the record strongly suggests Broderick knew that Walter's testimony was intentionally misleading, and thus crafted his questions to achieve literal accuracy while conveying the false impression that Walter's work had been validated through publication. *Drake v. Portuondo*, 553 F3d 230, at pg. 243.

f. That Walter had two weeks to conjure up his quackery, and adapted the symptoms of the syndrome to remedy any potential weakness in the prosecutions theory. *Drake v. Portuondo*, 553 F3d 230, at pg. 244.

g. That Walter lied about conversations between himself and Broderick, as well as the timing of those conversations prior to trial. *Drake v. Portuondo*, 553 F3d 230, at pg. 242, 244.

h. That Broderick knew that these portions of Walter's testimony were false, because the falsehood related to a conversation Walter had with Broderick." *Drake v. Portuondo*, 553 F3d 230, at pg. 243.

i. In addition to lying about his credentials and concocting a fictional syndrome, Walter's lied about how much time he had to consider the facts of the case and whether the case was difficult to determine. "...Broderick knew, however, the truth was quite different." *Drake v. Portuondo*, 553 F3d 230, at pg. 244. This timing was critical to the jury's determination.

"Thus, the supposed brevity of Walter's contact with the facts of this case was perhaps the strongest reason for the jury to conclude that Walter was not fabricating this sophisticated story." *Drake v. Portuondo*, 553 F3d 230, at pg. 244.

j. That the prosecutor engaged in conduct designed to inhibit the defense from gathering information to rebut the lying prosecution witness. *Drake v. Portuondo*, 553 F3d 230, at pg. 235, 244-245.

"...there was inferential support for the conclusion that *Broderick knowingly elicited Walter's false statements*. The prosecutor's decision to spring Walter's testimony at the last minute and resist a continuance provided circumstantial evidence of the *prosecutor's knowing complicity in the false testimony...*" *Drake v. Portuondo*, 553 F3d 230, at pg. 243 (emphasis added)

"The record strongly suggests that *Broderick knew that Walter's testimony about his scholarship was intentionally misleading*." *Drake v. Portuondo*, 553 F3d 230, at pg. 243 (emphasis added).

12. It is respectfully submitted that, based upon these extraordinary findings of egregious prosecutorial misconduct, retrial in this matter would constitute double jeopardy, a denial of Petitioner's right to a speedy trial, and a denial of due process of law, and the People should otherwise be prohibited from prosecuting Petitioner on this indictment.

LEGAL ANALYSIS

13. Reversal is an ill-suited remedy for prosecutorial misconduct where the trial was fundamentally fair to the defendant; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying. However, reversal is warranted where,

as here, the misconduct is so egregious as to deprive the defendant of a fair trial and due process of law. *People v. Galloway*, 54 NY2d 396 [1981]; *United States v Modica*, 663 F.2d 1173 [C.A.N.Y. 1981].

14. In order to reduce the danger of false convictions, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost.

15. A prosecutor may strike hard blows, but he or she is not at liberty to strike foul ones. *Berger vs. United States*, 295 US 78 [1935]; *People v. Clark*, 195 AD2d 988 [4th Dept., 1993]. “The zeal to convict a malefactor is commendable, but our system of justice imposes limits beyond which one may not go, whether deliberately or carelessly.” *People v. Payne*, 187 AD2d 245 [4th Dept., 1993].

16. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair. Where it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic. *US v. Agurs*, 427 US 97 [1976].

17. That egregious prosecutorial misconduct occurred in this case, that is the knowing use of perjured testimony directly related to the sole issue on trial, has been established by the findings of the Second Circuit.

18. The usual relief for prosecutorial misconduct resulting in an unfair trial, whether the verdict is nullified by the trial court or reversed on appeal is a retrial.

19. There is one well established exception to retrial. Reprosecution is barred where the conduct was done in such bad faith as to have as its purpose the provoking of a

motion for mistrial. *Gorghan v. DeAngelis*, 25AD3d 872 [3rd Dept., 2006] *aff'd* 7 NY3d 470 [2006]. Simply put, the prosecutor fears an acquittal so he or she creates a situation which forces the defense to move, and the court to grant, a mistrial. Double jeopardy is implicated because the prosecutor, based upon his own misconduct, tries to get a second chance at a conviction with a new jury. However, because no mistrial was granted in the instant case, those cases which discuss whether a defendant's right to have the trial completed by the selected tribunal are not necessarily implicated.

20. In addition to this well established exception, this Court found a potential bar to retrial on double jeopardy grounds where the defendant shows that the prosecutorial misconduct was so egregious that the judicial process itself broke down, such that society's interest in a new trial has been superceded by an overriding necessity to protect the integrity of the judicial process. *Matter of Potenza v. Kane*, 79 AD2d 467, lv. denied 53 NY2d 606 [1981].

21. This Court characterized this as "willful or grossly negligent" conduct designed to avoid an acquittal or to provoke a motion for a mistrial. "Such conduct may require a new trial, but it will not normally prevent reprosecution. Reprosecution will be prohibited only if the conduct was aimed at vitiating the protection of the double jeopardy clause to gain a more favorable opportunity to convict defendant." *Matter of Potenza v. Kane*, 79 AD2d 467, *supra*.

22. Citing *Potenza*, the Court of Appeals held that prosecutorial misconduct may be so egregious or provocative as to warrant the interposition of the double jeopardy bar under an "exceptional circumstances approach" even when no mistrial is granted. *People v. Adames*, 83 NY2d 89 [1993].

23. In *Adames*, the Court of Appeals decided to “leave that question for another day and an appropriate case.”

24. In *Gorghan v. DeAngelis*, 25AD3d 872 [3rd Dept., 2006] aff’d 7 NY3d 470 [2006] the Third Department applied the standards set forth in *Adames* and *Matter of Potenza v. Kane*, *supra*, notwithstanding that no mistrial had been granted.

25. It is respectfully submitted that this Court must make a determination as a matter of state law whether the prosecutorial misconduct found by the Second Circuit is “so egregious or provocative” as to have impaired the integrity of the judicial process.

26. It is further urged that this court should issue a writ of prohibition as a matter of discretion by weighing the relevant factors, including the gravity of the potential harm and whether the potential harm can be adequately corrected by other proceedings in law or equity. See, *Vinluan v. Doyle*, 873 NYS2d 72, 2009 NY Slip Opinion 00219 [2nd Dept., 2009].

27. It is respectfully submitted that, based on the facts and circumstances of this case, the prosecutorial misconduct in this case was so egregious that the judicial process itself broke down.

28. It is further submitted that society’s interest in a new trial in this case has been superceded by an overriding necessity to protect the integrity of the judicial process.

29. Absent a bar to reprosecution in a case such as this, the prosecutor’s duty to present a truthful case to the jury and to ensure justice will be rendered meaningless. To allow the actions of the prosecutor to go unpunished here is to leave the integrity of the judicial process unprotected. The remedy of a new trial is an ill-suited sanction to insure

nonrepetition of the misconduct. *People v. Farmer*, 122 AD2d 801 [2nd Dept., 1986]; *People v. Roopchand*, 107 AD2d 35 [2nd Dept., 1985].

30. The prosecutor's egregious misconduct in this case, as determined by the Second Circuit, was intentionally designed to avoid an acquittal at the expense of the integrity of the judicial system. This constitutes such extraordinary circumstances that society's interest in a new trial has been superceded by an overriding necessity to protect the integrity of the judicial process.

31. The prosecutor's actions in this case, that is knowingly using false testimony to obtain a conviction, are by definition a breakdown of the judicial process.

32. The level of misconduct in this case falls well beyond the ambit of those countless cases wherein a prosecutor is reprimanded for improper comments during summation, improper bolstering of a witnesses credibility, improperly appealing to the fears and sympathies of the jury, or improper derogation of a defendant or his or her defense. See, *People v. Barber*, 13 AD3d 898 [3rd Dept., 2004]; *People v. Castro*, 12 AD3d 1071 [4th Dept., 2004]; *People v. Spruill*, 5 AD3d 318 [1st Dept., 2004]; *People v. Shelton*, 303 AD2d 370 [2nd Dept., 2003]; *People v. Chatman*, 281 AD2d 264 [4th Dept., 2001]; *People v. Peck*, 272 AD2d 946 [4th Dept., 2000]; *People v. Tolliver*, 267 AD2d 1007 [4th Dept., 1999]; *People v. Rizzo*, 267 AD2d 1041 [4th Dept., 1999]; *People v. Dombrowski*, 163 AD2d 873 [4th Dept., 1990].

33. This case is likewise far more egregious then the case of a prosecutor delaying the delivery of exculpatory evidence to the defense. *People v. Brazeau*, 304 AD2d 254 [4th Dept., 2003].

34. A prosecutor's flagrant disobedience of the trial court's prior ruling, despite strong evidence of guilt, has resulted in reversal but not been a bar to retrial. *People v. Hammock*, 182 Ad2d 1114 [4th Dept., 1992]; *People v. Hammock*, 255 AD2d 957 [4th Dept., 1998].

35. Stated plainly, the conduct in this case reveals perhaps the most egregious form of prosecutorial misconduct short of actual criminal activity. The conduct here was intentional, deceitful and in dereliction of the prosecutor's duties both as a prosecuting attorney and as an officer of the court.

36. It is not the proper purpose of a federal habeas court to bar retrial on the grounds of prosecutorial misconduct in order to deter prosecutors from misconduct. The question whether retrial is improper under the constitutional principle of double jeopardy must be determined in the first instance by the state courts. *DiSimone v. Phillips*, 518 F3d 124 [2008].

37. The reversal of a judgment of conviction and granting of a new trial may serve only to ameliorate, but not eliminate, the injustice done to a specific criminal defendant. Reversal does nothing to protect the integrity of the judicial process because it does not prevent the continuation of unconscionable conduct on the part of prosecutors who fail to properly perceive their role in the criminal justice system as officers of the court.


38. The actions of the prosecutor in this case have also resulted in the evisceration of my due process and speedy trial rights as guaranteed the United States Constitution and the New York State Constitution. See, *People v. Singer*, 44 NY2d 241 [1978] and *People v. Taranovich*, 37 NY2d 442 [1975].

39. I have diligently pursued my legal remedies. I presented the courts with evidence that the expert witness committed perjury. I was ultimately successful in demonstrating that the prosecutor in this case knowingly presented the jury with this false and inflammatory evidence. The prosecutors in this case have fought for 27 years to deny me a fair trial notwithstanding that they knew that the expert witness committed perjury.

40. Additionally, based upon the facts and circumstances as set forth in the affidavit of my attorney, David J. Farrugia, Esq., submitted as part of this application, I am respectfully requesting that the Court grant me a temporary stay of the trial in this matter so that I may adequately prepare for trial, so that I may file and prosecute the appropriate motions to protect my rights to a speedy trial and due process of law, and so that this Article 78 proceeding may be determined prior to trial.

WHEREFORE, based upon the foregoing, your Petitioner respectfully demands an Order of this Court granting him the relief set forth above.

Dated: March /7 , 2009

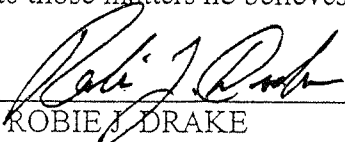


ROBIE J. DRAKE

VERIFICATION

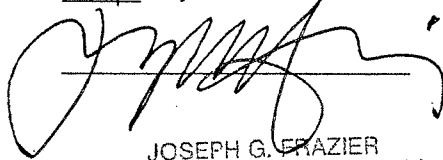
State of New York)
County of Niagara) ss:

Robie J. Drake, being duly sworn, deposes and states: that he is the Petitioner in the above captioned action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge except as to those matters alleged upon information and belief, and as to those matters he believes them to be true.



ROBIE J. DRAKE

Sworn to before me this
17 day of March, 2009.



JOSEPH G. FRAZIER
NOTARY PUBLIC, State of NY
Qualified in Niagara County
Commission Exp. March 19, 2010

EXHIBIT - C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

ROBIE J. DRAKE,

Petitioner

against

AFFIDAVIT

Index No.

HONORABLE RICHARD C. KLOCH, SR.,
an Acting Justice of the Supreme Court of the State
of New York, Niagara County,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

STATE OF NEW YORK)
COUNTY OF NIAGARA) ss:

David J. Farrugia, being duly sworn, deposes and states:

1. That I am an attorney at law licensed to practice in the courts of the State of New York; I am the Niagara County Public Defender and as such I am one of the attorneys for the Petitioner Robie J. Drake with respect to Niagara County Indictment No. 7205.

2. I make this affidavit of my own knowledge in support of the relief requested in the Petition and in support of Petitioner's request for a stay of the trial for the reasons set forth below.

3. The background facts of this case, including the reversal of the Petitioner's conviction are set forth in the Petition. The United States Court of Appeals, Second

Circuit, in a decision dated January 23, 2009, and by mandate issued on February 24, 2009, granted habeas corpus unless the state provided a new trial within 90 days. *Drake v. Portuondo*, 553 F3d 230 [2009]. An Order to that effect was filed in the United States District Court for the Western District of New York on March 3, 2009.

4. It is our position that the 90 day period within which to begin the trial commenced no sooner than March 3, 2009, by the filing of the Second Circuit mandate on that date with the United States District Court for the Western District of New York, and accordingly that this trial must be commenced no later than June 1, 2009.

5. On February 6, 2009, an application for public defender services was received from the Petitioner and the Niagara County Public Defenders Office accepted the Petitioner as a client. The trial of this matter has been assigned to your deponent and to Christopher A. Privateer, Esq., Assistant Public Defender.

6. On February 6, 2009, we appeared for the first time before the Honorable Richard C. Kloch, Sr., along with the Petitioner. At that time, the court set a trial date of March 23, 2009.

7. On February 6, 2009, your deponent was not in possession of any portion of the files of Petitioner's prior trial counsel, and was further not in possession of any of the files of Petitioners *habeas corpus* counsel.

8. I have learned that the original trial file kept by Petitioner's trial counsel was destroyed. This trial occurred in 1982 and all state court remedies had been exhausted.

9. I have received portions of the original trial exhibits from the Niagara County District Attorney's Office as well as a copy of the trial transcript. I received additional discovery materials on March 10, 2009. A review of this information leads me to the

conclusion that there may be numerous other items which I still do not have and which must be delivered to the defense.

10. Petitioner has requested an adjournment from the trial court which has been denied. See, Transcript of Proceedings held March 6, 2009.

11. On February 20, 2009, the People and the Petitioner entered into a written stipulation wherein the parties agreed to extend the time within which to commence the trial. This stipulation was sent to David Jay, Esq., Petitioner's local attorney for the *habeas corpus* proceeding in the United States District Court for the Western District of New York, and he presented the stipulation to the Hon. William M. Skretny. The court issued an Order on or about March 6, 2009 which denied the extension.

12. Petitioner has made in an application to the United States Court of Appeals, Second Circuit for an Order extending the time for trial, based on consent of the parties, and for clarification of the date from which the 90 day period began. To date there has been no response to that application.

13. On February 20, 2009, Judge Kloch ordered the Petitioner to provide a DNA sample to the prosecution. At this time, we are awaiting the results of that testing. In the event that there is a match, the Petitioner will need additional time to have the review and inspect the People's DNA test and also to obtain an independent test of the same.

14. This case involves a great deal of forensic expert evidence, including bite mark, weapons, and psychological expert testimony. We are diligently attempting to secure the services of these various experts, but will not be able to do so in the short time available prior to trial.

15. In addition, we expect to file a motion for dismissal of the indictment based upon the denial of a speedy trial and the denial of due process based upon the factors set forth in *People v. Singer*, 44 NY2d 241 (1978) and *People v. Taranovich*, 37 NY2d 442 (1975). The determination of this motion may require an evidentiary hearing to determine whether the defendant has suffered any prejudice as a result of the 27 year delay, and whether the People should be held accountable for this delay which was based entirely on misconduct the People's misconduct in the prosecution of this case and there continuing defense of their own misconduct for these many years. This motion cannot be made and heard until the defense has had a reasonable amount of time to review the evidence in this case. These cases indicate that the longer the delay, the more probable it is that the defendant will be harmed. *People v. Waldron*, 6 NY3d 463 [2006].

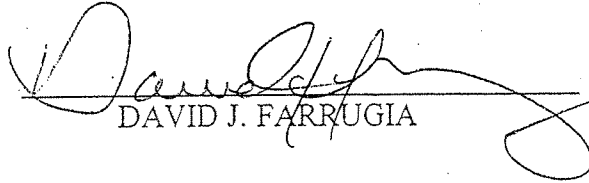
16. There may be other pre-trial motions which need to be filed, but this cannot be determined until the defense has full access to all available information.

17. In the event that the trial is commenced prior to the resolution of this Article 78 proceeding, this proceeding will be rendered moot.

18. Your deponent respectfully asserts that the defense has worked diligently to provide a proper legal defense and to accommodate the trial court. However, we cannot be ready for trial by March 23, 2009 as set by the trial court, and cannot effectively represent the Petitioner without some additional time to prepare his defense.

19. It is respectfully submitted that the time frame set by the Second Circuit Court of Appeals was intended to allow for a fair trial of the Petitioner, and that thus a stay in this matter does not run afoul of the purpose of that directive.

WHEREFORE, your deponent respectfully requests an Order of this Court granting a writ of prohibition in this matter for the reasons set forth in the Verified Petition, granting a stay of the trial in this matter to permit the defense to adequately prepare a defense and to permit the Article 78 proceeding to be completed, and for such other and further relief as the Court deems just and proper.


DAVID J. FARRUGIA

Sworn to before me this
17th day of March, 2009.

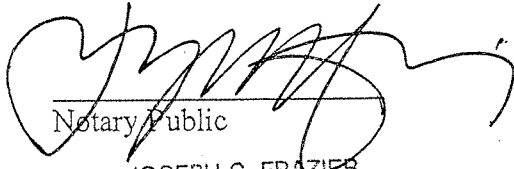

Notary Public
JOSEPH G. FRAZIER
NOTARY PUBLIC, State of NY
Qualified in Niagara County
Commission Exp. March 19, 20-10

EXHIBIT - D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

Robie J. Drake,

Petitioner,

Answer

v

Hon. Richard C. Kloch, Sr.,
An Acting Justice of the Supreme Court of the
State of New York, Niagara County,

and

The People the State of New York,
Respondents.

The answering respondent, the People the State of New York, by their attorneys, the Niagara County District Attorney's Office, as and for their answer to the petition state as follows:

1. Deny the allegations in paragraphs 3, 4, 5, and 12 of the petition.
2. Admit the allegations in paragraphs 2, 8 and 10 of the petition.
3. Do not possess the knowledge or information sufficient to answer paragraph 1 of the petition.
4. The allegations in paragraphs 7, 9, 11 and 13-39 contain legal argument or refer to documents that speak for themselves.

WHEREFORE, the respondent requests that the Court deny petitioner's application for a writ of prohibition on the grounds of double jeopardy and

denial of speedy trial rights.

Dated: Lockport, New York
March 18, 2009

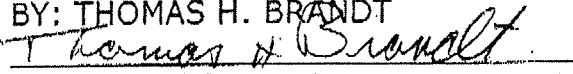
Respectfully submitted,
MICHAEL J. VIOLANTE
District Attorney of Niagara County
BY: THOMAS H. BRANDT

Assistant of Counsel
County Court House
Lockport, New York 14094
(716) 439-7085

EXHIBIT - E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

Robie J. Drake,
Petitioner,

Affidavit

v

Hon. Richard C. Kloch, Sr.,
An Acting Justice of the Supreme Court of the
State of New York, Niagara County,

and

The People the State of New York,
Respondents.

County of Niagara)
State of New York) ss.:

Thomas H. Brandt, being duly sworn, deposes and states as follows:

1. I am an assistant district attorney for Niagara County and make this affidavit in opposition to petitioner's application for a writ of prohibition to stop the petitioner's murder trial from commencing on March 23, 2009.
2. Petitioner was convicted in 1982 of two counts of second-degree murder.
3. On January 23, 2009, the Second Circuit Court Of Appeals issued an opinion and directed that the District Court for the Western District of New York conditionally grant petitioner's application for a writ of habeas corpus unless the State provided petitioner with a new trial within 90 days (*Drake v Portuondo*, 553 F3d 230 [2d Cir. 2009]). The second Circuit's mandate was issued on February 23, 2009. The District Court entered judgment on March 5, 2009.
4. Petitioner's trial is currently scheduled to begin with jury selection

on March 23, 2009.

5. Petitioner seeks to prohibit his retrial on double jeopardy and speedy trial grounds.
6. According to petitioner, double jeopardy should bar his retrial because the prosecutor at the original trial allegedly engaged in egregious conduct. Petitioner points to the Second Circuit's decision which stated that the prosecutor knew that portions of one of the prosecutor's expert witnesses was false. That false testimony, according to the Second Circuit, dealt with how much time the expert had to consider the facts of the case.
7. Petitioner acknowledges that the usual relief for prosecutorial misconduct is reversal and retrial (see petition at paragraph 18).
8. Petitioner argues, however, that the Court Appeals has held that "prosecutorial misconduct may be so egregious or provocative as to warrant the interposition of the double jeopardy bar under an 'exceptional circumstances approach' even when no mistrial was granted" (see petition at paragraph 22, citing *People v Adames*, 83 NY2d 89, 91 [1993]).
9. In *Gorghan v DeAngelis* (7 NY3d 470, 474 [2006]), the Court of Appeals held that "this well-established but narrow exception is equally applicable to reversals on appeal when a trial court has erroneously denied a defendant's mistrial motion". The Court went on to note that "although the prosecutor's conduct was deplorable, it was--as found by the Appellate Division--motivated by an intent to secure a conviction, not to provoke a mistrial motion. Thus, petitioner is entitled only to the ordinary remedy for harmful trial misconduct--a new, fair trial--and not dismissal of the indictment."
10. The *Gorghan* case closely followed this Court's own analysis in *Matter of Potenza v Kane* (79 AD2d 467, 470 [4th Dept 1981]), where this Court observed:

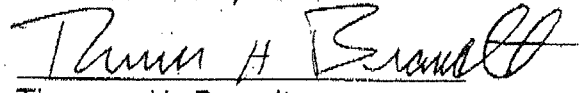
"Culling from the decisions, however, it seems that the exception will not apply unless the prosecutor's misconduct was motivated by bad faith, a characterization which suggests conduct willful or grossly negligent and "designed to avoid an acquittal", or to provoke a motion for mistrial. It is not enough that the prosecutor's conduct is motivated by a desire to gain an edge

over defendant. Such misconduct may require a new trial, but it will not normally prevent reprosecution. Reprosecution will be prohibited only if the misconduct was aimed at vitiating the protection of the double jeopardy clause to gain a more favorable opportunity to convict defendant."

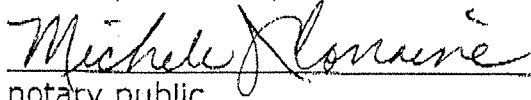
11. In *Potenza*, this Court analyzed the evidence and concluded "There is nothing in the record suggesting that the prosecutor needed or wanted a second trial or that his conduct was designed to abort the trial to secure another more favorable chance to convict" (*Id.* 474).
12. The respondent submits that petitioner's case is similar to *Potenza* and *Gorghon*. Petitioner makes no allegation that there is any proof that the prosecutor "needed or wanted a second trial or that his conduct was designed to abort the trial to secure another more favorable chance to convict" (*Potenza* at 474).
13. The Second Circuit's holding that the prosecutor supposedly knew that his expert misled the jury concerning how much time he had worked on the case does not supply proof that the prosecutor intended to cause a mistrial rather than secure a conviction. Just the opposite.
14. In essence, petitioner's argument is basically that anytime there is reversal for perjurious testimony known by the prosecution to be such, double jeopardy bars a retrial. However, petitioner cites no case in support of this argument and your deponent has not found any.
15. Petitioner only hints at his speedy trial argument rather than articulating it. Petitioner was tried within a year of the crime. Any delay after the vacature ordered by the Second Circuit lies at petitioner's feet, as evidenced by his accompanying motion for an extension of the trial date.
16. Respondent does not oppose petitioner's request for an extension of time to prepare for trial. It is respondent's position that the 90 day retrial timeframe ordered by the Second Circuit begins to run 90 days from the March 5 entry of the judgment in the District Court, not 90 days from the January 24 opinion.

Wherefore, your respondent requests that the Court deny the petitioner's

request to bar the trial and grant petitioner's request for a postponement of the trial date so that the trial occurs within 90 days from March 5, 2009.


Thomas H. Brandt

Sworn to before me the
18th day of March, 2009

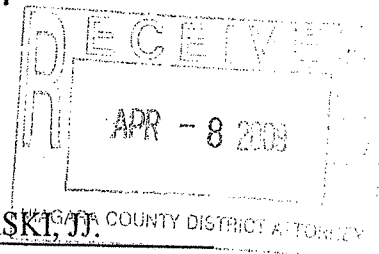

notary public

MICHELE J. CORRAINE
NO. 01CO4778168
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires on March 30, 2010

EXHIBIT - F

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. OP 09-00629



PRESENT: SCUDDER, P. J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ.

IN THE MATTER OF ROBIE J. DRAKE, PETITIONER,

V

HONORABLE RICHARD C. KLOCH, SR., AN ACTING JUSTICE OF THE
SUPREME COURT OF THE STATE OF NEW YORK, NIAGARA COUNTY, AND

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENTS-RESPONDENTS.

Petitioner having moved, upon the return of an order to show cause granted by the Honorable Jerome C. Gorski on March 23, 2009, for a stay of the prosecution of Indictment No. 7205 pending the hearing and determination of this CPLR article 78 proceeding,

Now, upon reading and filing the affidavit of David J. Farrugia sworn to March 17, 2009, the petition of Robie J. Drake verified March 17, 2009, said show cause order with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied, and the proceeding is dismissed.

Memorandum: Petitioner has not demonstrated that the alleged prosecutorial misconduct in his case was conducted in a deliberate attempt to provoke him to move for a mistrial (*cf. Matter of DeFilippo v Rooney*, 11 NY3d 775, 776 [2008]; *Matter of Gorghon v DeAngelis*, 7 NY3d 470, 473-474 [2006]). Petitioner was therefore not denied the right to have his trial completed by a particular tribunal (*see Matter of DeCanzio v Kennedy*, 88 AD2d 770, 771 [1982], *lv denied* 57 NY2d 601 [1982]).

Entered: April 7, 2009

PATRICIA L. MORGAN, Deputy Clerk

EXHIBIT - G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT
In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

ROBIE J. DRAKE,

Petitioner

against

NOTICE OF APPEAL

Docket No. OP 09-00629

HONORABLE RICHARD C. KLOCH, SR.,
an Acting Justice of the Supreme Court of the State
of New York, Niagara County,

Niagara County
Indictment No. 7205

and

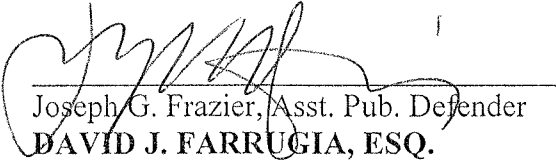
THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

SIRS:

PLEASE TAKE NOTICE that the Petitioner, **ROBIE J. DRAKE**, hereby appeals to the Court of Appeals of the State of New York, from an Order of the Supreme Court, Appellate Division, Fourth Judicial Department, from an Order of that Court entered April 7, 2009 and served on the Petitioner on April 14, 2009, which dismissed Petitioner's proceeding which sought an Writ of Prohibition under Article 78 of the Civil Practice Law and Rules. This appeal is brought pursuant to section 5602(b)(1) of the Civil Practice Law and Rules.

Dated: May 6, 2009
Lockport, New York


Joseph G. Frazier, Asst. Pub. Defender
DAVID J. FARRUGIA, ESQ.
Niagara County Public Defender
Attorney for Defendant
175 Hawley Street
Lockport, New York 14094
Phone: 716-439-7071

TO: Clerk
Supreme Court, Appellate Division
Fourth Judicial Department

Michael J. Violante, III, Esq.
Niagara County District Attorney
Respondent

New York State Attorney General
Attorney for
Hon. Richard C. Kloch, Sr., Respondent

EXHIBIT - H

NEW YORK STATE COURT OF APPEALS

In the Matter of a Proceeding Pursuant to Article 78
of the Civil Practice Law and Rules,

ROBIE J. DRAKE,

Petitioner,

against

**STATEMENT PURSUANT TO
RULE 500.22(b)**

HONORABLE RICHARD C. KLOCH, SR.,
an Acting Justice of the Supreme Court of the State
of New York, Niagara County,

App. Div. Docket No. OP 09-00629

Niagara County
Indictment No. 7205

and

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PROCEDURAL HISTORY

1. This is an appeal from an Order of the Appellate Division, Fourth Judicial Department, dated April 7, 2009, which dismissed the Article 78 proceeding brought by Petitioner Robie J. Drake, which sought an order prohibiting the retrial of his 1982 conviction based upon the Double Jeopardy clauses of the United States Constitution and the New York State Constitution.

2. This application is timely in that the Order of the Appellate Division and Notice of entry thereon were served upon the Petitioner on April 14, 2009, and thus this application is made within 30 days as required by section 5513(b) of the Civil Practice Law and Rules.

3. This is a direct application for leave to appeal to the Court of Appeals pursuant to Civil Practice Law and Rules section 5602(a) and no prior motion for leave to appeal has been filed in the Appellate Division.

4. Robie J. Drake was convicted in 1982 on two counts of intentional murder under Niagara County Indictment 7205. The conviction was affirmed on appeal by *People v. Drake*, 129 AD2d 963 [4th Dept., 1987].

5. A subsequent application pursuant to Article 440 was denied without a hearing and affirmed by *People v. Drake*, 256 AD2d 1159 [4th Dept., 1998].

6. Mr. Drake's petition for a writ of habeas corpus was denied without a hearing by the United States District Court for the Western District of New York. *Drake v. Portuondo*, 99-CV-0681E(SR), 2001 WL 266021.

7. The United States Court of Appeals, Second Circuit, vacated the District Court's Order and remanded the matter for discovery and hearing. *Drake v. Portuondo*, 321 F3d 338 [2003].

8. On remand, the District Court again denied the application without a hearing based upon deposition testimony. *Drake v. Portuondo*, 99 Civ. 0681 [W.D.N.Y. March 16, 2006].

9. The United State Court of Appeals, Second Circuit, conducted a de novo review of the district court's legal and factual findings, made its own findings of fact, and reversed the decision of the district court, and remanded the matter for entry of a conditional order granting habeas corpus unless a new trial was held within 90 days. *Drake v. Portuondo*, 553 F3d 230 [January 23, 2009].

10. By Order of the Second Circuit, upon Stipulation of the parties, the time within which to hold the trial was extended an additional 270 days. The Petitioner remains incarcerated and a trial is schedule for December 2009.

JURISDICTIONAL STATEMENT

11. The Court of Appeals has jurisdiction to hear this application for permission and to hear the proposed appeal pursuant to Civil Practice Law and Rules section 5602(a)(1) in that (i) the Order of the Appellate Division sought to be appealed is a final determination of this action pursuant to §§ 5501(a) and 7806 of the Civil Practice Law and Rules; (ii) this action originated in the Supreme Court, Appellate Division, Fourth Judicial Department; and (iii) the Order of the Appellate Division was unanimous and thus is not appealable as a matter of right.

12. Petitioner further asserts that this case involves a substantial question regarding the application of the Double Jeopardy clause and thus this case directly involves the construction of the constitutions of the state and of the United States as set forth in section 5601(b)(1) and thus the Petitioner should be entitled to appeal as a matter of right. Accordingly, a Notice of Appeal and Rule 500.9 preliminary appeal statement have been or will be filed in this Court by Petitioner within proscribed time.

STATEMENT OF QUESTIONS PRESENTED

13. This case presents an opportunity to cure a substantial injustice. The failure to provide an adequate remedy to this Petitioner will have a substantial impact upon future cases throughout the state, the public perception of the integrity and fairness of the

judicial system, and the checks and balances which need to be in place to prevent overreaching and misconduct by overzealous prosecutors.

14. The remedy currently being afforded to this Petitioner, a new trial 27 years after his improper conviction, is insufficient to cure the harm done to this Petitioner and is insufficient to remedy the harm to the integrity of the system of justice as a whole.

15. Robie J. Drake was convicted on two counts of intentional murder and has been incarcerated since 1982. The Second Circuit found that Drake was convicted upon perjured and fabricated expert testimony which was material to the case. The testimony bore directly on the question of Drake's intent which was the sole issue in the case. The testimony consisted of a completely fabricated psychological condition. The Appellate Division, on the direct appeal of the conviction, cited the concocted psychological condition in its decision to uphold the conviction. *People v. Drake*, 129 AD2d 963 [4th Dept., 1987].

16. Prior to ordering a new trial, in its review of the federal habeas corpus denial, the Second Circuit found that Drake had no prior opportunity to develop the record in the state and federal courts and directed the district court to conduct discovery and hold hearings, if necessary. Based upon the newly developed record, the Second Circuit made certain findings of fact. Importantly, the court concluded that the expert testimony was perjured and that the district attorney knew that the testimony was false at least in part. The court also concluded that the district attorney feared an acquittal because there was little other evidence of any motive or intent. Additionally, the prosecutor's opposition to Drake's request for a continuance denied Drake the ability to expose the perjury, thus

compounding the misconduct. Had this perjury been exposed at the time of trial, the court would have almost certainly granted Drake's request for a mistrial.

17. The Order of the Appellate Division from which this appeal is sought is based upon settled law that where a prosecutor fears an acquittal, and attempts to provoke a mistrial in the hope of obtaining a second chance at a conviction by a different jury, the Double Jeopardy clause prohibits retrial. It is respectfully submitted that this standard is inadequate to protect an accused from the egregious prosecutorial misconduct which occurred in this case, and that there is no other adequate remedy other than prohibition.

18. This Court is respectfully asked to consider whether the district attorney's subjective intention should properly be the basis for denying the relief requested. It would be virtually impossible for an accused to demonstrate that a prosecutor's subjective intent was to provoke a mistrial rather than to secure an arguably improper conviction. An accused has no meaningful protection against such egregious prosecutorial misconduct where the only relief afforded is a new trial decades later.


19. The application for the Writ of Prohibition in this case argues that the district attorney feared an acquittal on the intentional murder charges, and that he engaged in egregious misconduct in an effort to avoid that acquittal.

20. The remedy of a new trial is inadequate to address the harm to Mr. Drake. His first trial having been a patently unfair, he must now hope for a fair trial 27 years after being accused of the crimes. Importantly, this is through no fault of Mr. Drake. As found by the Second Circuit, he researched the facts and legal issues while incarcerated and diligently pursued his legal remedies.

21. The remedy of a new trial under these and similar circumstances is likewise inadequate to deter future misconduct by overzealous prosecutors.

22. Based upon the foregoing, Petitioner respectfully requests that this Court grant leave to appeal.

Dated: May 6, 2009



JOSEPH G. FRAZIER
Assistant Niagara County Public Defender
NIAGARA COUNTY PUBLIC DEFENDER
175 Hawley Street
Lockport, New York 14094
Phone: 716-439-7071

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Robie J. Drake,

petitioner,

Docket No. 99-cv-681(S)

-v-

L.A. Portuondo,

AFFIDAVIT OF SERVICE

respondent.

STATE OF NEW YORK)
COUNTY OF NIAGARA) ss.:

Robie J. Drake, being first duly sworn, deposes and says:

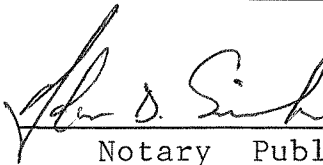
That on this 31 day of MAY, 2010, I served a true copy of the original papers of the proceeding within, to wit: petitioner's Motion for Relief under Fed.R.Civ.Proc. Rule 60(b)(6); Supporting Affidavit; Exhibits; Memorandum of Law; together with Affidavit of Service upon:

THOMAS H. BRANDT, ESQ.,
Assistant District Attorney
(Attorney for Respondent)
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094-2740

by placing said papers in ~~an envelope with sufficient postage affixed and~~ ~~postage prepaid Priority Mail~~ ~~envelope~~ ^{an envelope with sufficient postage affixed and RR} properly addressed to the person, above-named, and by placing same in a U.S. Mail depository box at the Niagara County Jail, in the County of Niagara, State of New York.


Robie J. Drake

Sworn to before me this
31 day of MAY, 2010.


Notary Public

ADAM D. SIEMUCHA
NOTARY PUBLIC
STATE OF NEW YORK
QUALIFIED IN NIAGARA COUNTY
MY COMMISSION EXPIRES DEC 31, 2011

Robie J. Drake
c/o Niagara County Jail
5526 Niagara St. Ext.
P.O. Box 496
Lockport, New York 14094

June 1, 2010

MICHAEL J. ROEMER, CLERK
United States District Court
Western District of New York
United States Courthouse
68 Court Street
Buffalo, New York 14202

Re: Drake v. Portuondo, No. 99-CV-681(S),
Filing of Motion for Relief Under Fed.R.Civ.Proc. Rule 60(b)(6)

Dear Sir:

Enclosed herein for filing and the Court's consideration in the above-referenced matter please find: petitioner's Motion for Relief Under Fed.R.Civ.Proc. Rule 60(b)(6); Supporting Affidavit; Memorandum of Law; Exhibits and Affidavit of Service.

Please note that I am filing this motion pro se, and am an indigent prisoner.

I have not set a Return Date for this Motion. I ask that the Motion be scheduled and heard as the Court's calendar allows.

Should the Court need any further documents regarding this matter please so advise. I thank you in advance for your time and anticipated services.

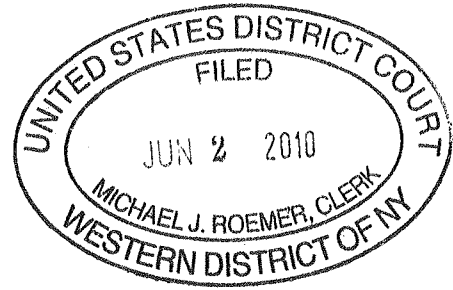
Very truly yours,



Robie J. Drake

enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



ROBIE J. DRAKE,

Petitioner,

v.

Docket No. 99-CV-681(S)

LEONARD A. PORTUONDO,

Respondent.

PETITIONER'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR RELIEF UNDER
RULE 60(b)(6) OF THE FEDERAL RULES
OF CIVIL PROCEDURE

Robie J. Drake,
petitioner, pro se
5526 Niagara St. Ext.
P.O. Box 496
Lockport, New York 14094

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Preliminary Statement

Petitioner Robie J. Drake, acting pro se, submits this memorandum of law in support of his motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for an Order granting permission to reopen the judgment in this case and amending the judgment to grant the writ of habeas corpus unconditionally, and discharging the petitioner from custody, where the extraordinary circumstances in this case require such relief to prevent the continued violation of petitioner's right to be free from double jeopardy under the Fifth Amendment of the United States Constitution.

Judgment was previously entered in this action pursuant to the decision and mandate of the Court of Appeals, which held that petitioner's state court convictions for second degree murder were unconstitutional because the trial prosecutor knowingly used perjured testimony--producing a bogus expert witness at the 11th hour who gave extremely prejudicial testimony concerning a fictitious syndrome petitioner supposedly had that caused him to kill and mutilate to satisfy a warped sexual urge, and further misled the trial court and defense counsel about the true nature of his contacts and pretrial preparation of the witness to oppose defense counsel's request for a continuance--to secure petitioner's convictions.

The Court of Appeals granted a conditional writ, ordering petitioner released unless he was retried within 90-days (see, Drake v. Portuondo, 553 F.3d 230 [2d Cir. 2009]).

The issue of whether the prosecutor's egregious misconduct, motivated by a desire to avoid an acquittal he believed likely to occur in the absence of the false expert testimony, would bar a retrial under the double jeopardy clause pursuant to the rule of Oregon v. Kennedy, 456 U.S. 667 (1982), was never raised before, or addressed by, the Court of Appeals in this case.

The reason for this is that the issue had not previously been raised in the state courts and therefore was unexhausted. Importantly, the state courts denied petitioner the opportunity to fully develop the record regarding the claim that the trial prosecutor knowingly used false testimony. Had all the material facts surrounding the perjury claim been developed before the state courts, the double jeopardy question could have been raised and addressed before the Court of Appeals.

Petitioner raised the double jeopardy issue before the state courts, petitioning for a writ of prohibition, pursuant to Article 78 of the New York Civil Practice Law and Rules. The Appellate Division, Fourth Department, dismissed the writ, and the New York Court of Appeals dismissed the appeal therefrom and denied leave to appeal (see, Drake v. Kloch, 13 N.Y.3d 755 [2009]).

The Second Circuit granted two extensions, as sought by both parties, with which to retry the case. The retrial commenced on March 8, 2010, and on March 23, 2010, petitioner was again convicted, after a jury trial, of two counts of murder in the second degree.

Petitioner now moves this Court for relief under Rule 60(b)(6) of the Fed.R.Civ.Proc. on the ground that justice and the extraordinary circumstances of this case require that the judgment be reopened and amended to grant the writ of habeas corpus unconditionally and order the petitioner discharged from custody, on the ground that his continued prosecution and confinement is in violation of the double jeopardy clause of the Fifth Amendment of the Constitution.

The double jeopardy issue is explicitly interwoven with the perjury claim that the Court of Appeals granted habeas relief upon, and would have warranted the relief sought herein had it been exhausted in the state courts at the time the Court of Appeals determined the perjury claim.

The nature of the relief sought and the factual and legal arguments supporting it are such that relief under Clauses (1-5) under Rule 60(b) are inapplicable. It would be inappropriate to file another petition for habeas corpus, or recharacterize this motion as a habeas petition, because the double jeopardy claim is explicitly interwoven with the perjury claim upon which conditional habeas relief was granted. Petitioner is merely seeking to obtain the relief he would have been originally entitled to had the double jeopardy claim been addressed by the state courts at the time the perjury claim was adjudicated.

This Court has jurisdiction over this matter. The question of whether or not the prosecutorial misconduct in this case

would bar a retrial under Oregon v. Kennedy, supra, was neither expressly or implicitly decided by the Court of Appeals and is a new matter to be determined by this Court in the first instance.

Because the state courts erred and unreasonably arrived at the conclusory decision that the "alleged" prosecutorial misconduct was not intended to provoke a mistrial, and thus did not violate petitioner's protection against double jeopardy, this Court is urged to grant the relief sought herein and discharge petitioner who was been imprisoned for almost three decades.

Statement of Facts

Petitioner was charged in the New York State County Court, Niagara County, with two counts of second degree murder (Penal Law § 125.25[1]) in connection with the shooting deaths of Steven Rosenthal and Amy Smith, around midnight on December 5, 1981.

In Drake v. Portuondo, 553 F.3d 230, (Drake II), the Court of Appeals recounted the "pertinent trial testimony" from its prior decision on the case (321 F.3d 338 [Drake I]), as follows:

[Smith and Rosenthal] were in Rosenthal's rusty 1969 Chevy Nova in the parking lot of a factory in the Town of North [Tonawanda], New York. The factory parking lot was adjacent to a junkyard with abandoned vehicles. [Smith and Rosenthal] were using the spot as a lovers' lane

In a confession, Drake said that he left home at approximately 11:30 p.m., dressed in military fatigues and armed with a loaded Marlin .22

caliber semi-automatic rifle, a loaded Winchester .22 caliber high powered rifle, extra ammunition and two hunting knives, and that he went to the junkyard looking for abandoned vehicles to use in target practice. He said that the first vehicle he came across was the parked Nova, that he believed the car to be abandoned because the engine was off and no noise came from within, and that he opened fire on the passenger side window of the car with his semi-automatic rifle.

Drake claimed that he did not intend to kill Smith and Rosenthal, and insisted that he learned of their deaths only when he inspected the car, heard Rosenthal groaning, and opened the door to find the two bodies. According to Drake, he stabbed Rosenthal twice, in a fit of panic, to stop him from groaning, but ... he "didn't mean to kill him or anything." Trial Transcript at 267. According to Drake, Rosenthal was fully clothed, Smith not. Unsure of what to do, he drove the Nova car to a secluded spot down the road from the parking lot, and put Rosenthal's body in the trunk. Surprised by a passing car, Drake got back in the car and drove to the Niagara County dump in the neighboring town of Wheatfield, where he was putting Smith's body into the trunk when he was spotted by two police officers on routine patrol.

553 F.3d at 233-234 (quoting Drake I, 321 F.3d at 341). The Court of Appeals also observed:

The only issue at trial was whether Drake had the intent requisite for second degree murder. Although an announcement was made over the high school's public address system requesting that any student with information about Drake and the victims come forward, only one witness testified as to any such information-that she had overheard Drake and Rosenthal exchange profanity on one occasion in the cafeteria. Thus, the prosecution advanced the theory that the shooting was a sex-crime

553 F.3d at 234.

This finding is underscored by the prosecutor's opening statement in which Broderick never argued that petitioner knew Smith or Rosenthal, but promised the jurors evidence "... medically and from his own statement ... of a sexual assault that took place after Amy Smith died. And we will offer you that as evidence of his purpose in doing what he did." (Trial Transcript at 38)

Approximately one month before the trial, defense counsel moved to examine the rectal slides from the Smith autopsy that purportedly had semen on them. The medical examiner initially could not find the slide, but the following day he notified Broderick that he had found the slide, but there was no sperm on it. "The pathologist who had taken the slide had been mistaken about the semen and had been 'let go.' Broderick Dep. I at 36." (553 F.3d at 234)

Broderick spoke with Dr. Levine and explained that he had lost the rectal semen evidence. Dr. Levine "said the guy that you've got to talk to is Dr. Walter," (Broderick Dep. I, at 38-39). Although Broderick spoke with Walter on October 7, 1982, for almost an hour and had another phone conversation with him, of unknown duration, a day or two later, Broderick never informed the defense of his intention to call Walter until October 21, 1982--the day before Walter was to take the stand. (553 F.3d at 235)

The defense motion to preclude Walter's testimony as a sanction for the discovery violation was denied, as well as to exclude it for numerous evidentiary reasons (Trial Transcript

at 745-750, 778-781).

Walter testified that he had worked at the Los Angeles County Medical Examiner's Office where he prepared psychological profiles of murder and voluntary manslaughter crimes, claiming personal involvement in at least 5,000 to 7,500 cases; was a prison psychologist for the Michigan Department of Corrections who profiled over 400 sex offenders at a special unit; was an "adjunct lecturer" at Northern Michigan University; had testified as an expert witness in Los Angeles and Pasadena; and claimed membership in a number of professional groups, many of whom he professed to have lectured to (Trial Transcript at 783-792; 553 F.3d at 236).

Walter then proceeded to inflict inestimable damage to the defense, stating the case was clearly a "lust murder," and fit the profile of a syndrome called "picquerism," a "pathological condition" where one obtains sexual satisfaction "... that they can control and ... degrade and ... annihilate and consume others" (Trial Transcript at 793-795, 798-799; 553 F.3d at 236-237).

Petitioner's convictions followed and he was sentenced to an aggregate prison term of 40 years-to-life. The judgment was affirmed on direct appeal (see, People v. Drake, 129 A.D.2d 963 [4th Dept. 1987]).

Years after his direct appeal was exhausted, petitioner discovered--through his own research while imprisoned--that Walter had perjured himself regarding his qualifications, and

that the purported "picquerism" syndrome was not validated by any recognized, professional treatise.

Petitioner filed a motion to vacate judgment pursuant to New York Criminal Procedure Law § 440.10 on the grounds that Walter committed perjury and Broderick, the trial prosecutor, knew or should have known that the testimony was false. Niagara County Court (Fricano, J.) denied the motion without an evidentiary hearing, and that decision was affirmed on appeal (see, People v. Drake, 256 A.D.2d 1159 [4th Dept. 1998]).

After exhausting his state remedies, petitioner filed for federal habeas corpus relief with this Court on those same grounds. On March 16, 2001, this Court (Elfvin, S.D.J.) dismissed my petition for habeas relief without discovery or an evidentiary hearing (see, Docket No. 22).

The Court of Appeals vacated judgment and remanded the case for discovery and, if necessary, an evidentiary hearing to permit petitioner to develop the record on the issue of whether the prosecutor knew or should have known that their expert, Richard D. Walter, was committing perjury. Drake v. Portuondo, 321 F.3d 338 (2d Cir. 2003). The Court of Appeals found that petitioner had made a showing of good cause for developing the record, and because the state CPL § 440.10 court denied the motion to vacate judgment without a hearing, and the Appellate Division affirmed on that incomplete record, there were no findings of fact requiring deference. (Id., 321 F.3d at 345).

The Court of Appeals made the following findings:

a. That Richard D. Walter's testimony regarding his qualifications was perjured, Walter was a "charlatan," and his testimony was "medically speaking, nonsense." Id., 321 F.3d at 340, 342, 346;

b. That the supposed "picquerism" syndrome is referenced nowhere except in true-crime paperback. Id., 321 F.3d at 340;

c. That the only issue for the jury at the trial was whether the prosecution could prove the intent requisite for second degree murder. Id., 321 F.3d at 341;

d. That Walter's highly prejudicial testimony was intended to bolster what the prosecutor believed was a significant weakness in the evidence supporting his theory of intent. Id., 321 F.3d at 342, 346;

e. That the prosecutor ambushed the defense with Walter's pseudo-expert testimony, notifying the defense of his intention to call Walter only the day before he testified and successfully opposed the defense request for a continuance. Id., 321 F.3d at 342;

f. That petitioner had diligently sought to develop the factual basis underlying the perjury claim, but was prevented by the state court from doing so. Id., 321 F.3d at 347;

On remand, depositions were taken of Peter L. Broderick and Richard D. Walter. The Court did not hold a hearing, but found that Broderick was not aware of Walter's perjury, and

that the false testimony was not material to the jury's verdict. The district court (Elfvig, S.D.J.) again ordered that judgment be entered dismissing the petition for habeas corpus (see, Docket No. 59).

The Court of Appeals conducted a de novo review of the legal and factual findings and found that the district court "committed clear error in reaching its findings with respect to Broderick's knowledge of Walter's false testimony" Drake v. Portuondo, 553 F.3d 230, 247 (2d Cir. 2009) (Drake II). The Second Circuit reversed the decision of the district court and remanded for entry of judgment conditionally granting the writ of habeas corpus, ordering petitioner's release unless a new trial was held within 90 days. Id., 553 F.3d at 247-248.

The Court of Appeals made the following findings upon its review of the record:

a. The only question at trial was whether the defendant had the requisite intent to commit second degree murder. Id., 553 F.3d at 234;

b. That Richard Walter's perjured testimony went directly to the issue of intent, and that the other evidence adduced at trial bearing on intent was no conclusive. Id., 553 F.3d at 234, 247;

c. The jury's "estimate of the truthfulness" of Walter's testimony may well have been determinative of the issue of

intent because Walter's concocted theory filled an important gap in the prosecutor's theory of the case. Id., 553 F.3d at 245;

d. Walter's false testimony consisted of gross exaggerations and outright lies regarding his qualifications. Id., 553 F.3d at 238;

e. In addition to perjuring himself about his qualifications and concocting a fictional syndrome that was custom tailored to fit matters having any evidentiary support in the record, Walter also lied about how much time he had to consider the facts of the case and whether the case was difficult to determine. Walter had two weeks to conjure up his quackery and adopt the symptoms of the syndrome to patch any potential weakness in the prosecution's case. Walter falsely claimed he only became involved in the case the night before he testified. "[B]roderick knew, however, the truth was quite different" (id., 553 F.3d at 244). Broderick obviously knew these portions of Walter's testimony were false because the falsehoods related to conversations he had with Walter. See 553 F.3d at 242-244.

"Thus, the supposed brevity of Walter's contact with the facts of this case was perhaps the strongest reason for the jury to conclude that Walter was not fabricating this sophisticated story."

553 F.3d at 244.

f. The record strongly suggests Broderick knew Walter's testimony was false or intentionally misleading. Broderick crafted his questions to achieve literal accuracy while conveying the false impression that Walter's work had been

validated through publication. Id., 553 F.3d at 243;

g. That Broderick ambushed the defense with Walter's testimony, producing him at the last minute, and then opposed a continuance to allow the defense any meaningful opportunity to investigate or rebut the testimony.

"[T]here was inferential support for the conclusion that **Broderick knowingly elicited Walter's false statements.** The prosecutor's decision to spring Walter's testimony at the last minute and resist a continuance provided circumstantial evidence of the **prosecutor's knowing complicity in the false testimony**"

* * * *

"The record strongly suggests that **Broderick knew that Walter's testimony about his scholarship was intentionally misleading.**"

Drake II, 553 F.3d at 243 (emphasis supplied)

The Court of Appeals decided the case on January 23, 2009. On February 4, 2009, the Niagara County District Attorney's Office had Niagara County Sheriff's Department deputies transport petitioner from Sing Sing Correctional Facility in Ossining, New York to the Niagara County Jail in Lockport, New York.

On February 6, 2009, petitioner was brought before the Supreme Court, Niagara County (Hon. Richard C. Kloch Sr.) for a status conference. Because petitioner was and remains indigent, the Niagara County Public Defender, David J. Farrugia, Esq., was appointed to represent petitioner. Due to scheduling constraints, and to comply with the Second Circuit's 90 day

retrial order, Supreme Court set a retrial date for March 23, 2009.

Both parties requested an extension of time from the Court of Appeals to prepare for the retrial. On March 20, 2009, the Second Circuit granted an extension and a new retrial date was set for October 5, 2009 (see, Moving Affidavit, ¶ 19).

Upon the affidavit of David J. Farrugia, Esq., sworn to on March 17, 2009, and the petition of Drake, verified on March 17, 2009, Hon. Jerome C. Gorski, a Justice of the Supreme Court, Appellate Division, Fourth Department, granted an Order to Show Cause directing the respondents to appear and show why judgment should not be entered pursuant to Article 78 of the New York Civil Practice Law and Rules, prohibiting the state from retrying the petitioner on double jeopardy grounds for the reason that the egregious prosecutorial misconduct, as found by the Second Circuit, barred a retrial under Oregon v. Kennedy, supra (see, Moving Affidavit ¶ 20, Exhibits A, B & C).

By answering papers sworn to March 18, 2009, Assistant District Attorney Thomas H. Brandt appeared for the respondents and opposed the Article 78 petition (see, Moving Affidavit, Exhibits D and E).

By memorandum and order entered April 7, 2009, the Appellate Division, Fourth Department, entered judgment dismissing the Article 78 prohibition proceeding, holding that:

"Petitioner has not demonstrated that the alleged prosecutorial misconduct in his case was conducted in a deliberate attempt to provoke him to move for a mistrial Petitioner was therefore not denied the right to have his trial completed by a particular tribunal"

(see, Moving Affidavit, Exhibit F, unpublished memorandum decision [citations omitted]).

A timely notice of appeal was filed, as well as an application for leave to appeal to the New York Court of Appeals (see, Moving Affidavit, Exhibits G and H).

On September 1, 2009, the New York Court of Appeals dismissed petitioner's appeal and denied him leave to appeal. See Drake v. Kloch, et al., 13 N.Y.3d 755, 886 N.Y.S.2d 90, 914 N.E.2d 1008.

During July 2009, petitioner's family, with funds of their own, retained Andrew C. LoTempio, Esq., a solo practitioner, to represent petitioner on the retrial. Over the ensuing months petitioner worked continuously with Mr. LoTempio to prepare the case for retrial, assisting in the research of the myriad of complex issues surrounding the retrial of this 28 year old case (see, Moving Affidavit ¶¶ 25 and 26).

Counsel still needed additional time to prepare the case for retrial and a second extension was sought and granted by the Court of Appeals, during which time petitioner continued to work with counsel on the numerous pretrial motions and discovery to prepare the case for retrial (see, Moving Affidavit, ¶¶ 26, 42 and 43).

The retrial ultimately commenced on March 8, 2010 before Justice Kloch and a jury. On March 23, 2010, petitioner was again convicted of two counts of second degree murder.

For the reasons that follow, petitioner Robie J. Drake asks this Court to grant relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure by reopening the judgment in this matter and amending it to grant the writ unconditionally and order the petitioner discharged from custody on the grounds that the trial prosecutor malevolently elicited Walter's false testimony and manipulated the trial court and defense counsel to prevent its discovery in time to act. And Broderick did so to prevent an acquittal on the intentional murder charges which he believed at the time was likely to occur in the absence of the egregious misconduct, and so subverted petitioner's valued right to have his trial completed by a particular tribunal. Petitioner's rights under the Double Jeopardy Clause have been violated. Justice and the extraordinary circumstances of this case require the relief sought.

A R G U M E N T

THE RETRIAL OF PETITIONER IN STATE COURT ON THE INTENTIONAL MURDER CHARGES VIOLATED THE DOUBLE JEOPARDY CLAUSE WHERE THE PROSECUTOR DELIBERATELY USED FALSE TESTIMONY AND MANIPULATED THE TRIAL COURT AND DEFENSE COUNSEL TO PREVENT ITS DETECTION, AND DID SO WITH THE INTENTION OF DENYING THE DEFENDANT AN OPPORTUNITY TO WIN AN ACQUITTAL HE BELIEVED LIKELY TO OCCUR IN THE ABSENCE OF SUCH FALSE TESTIMONY; AND THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE REQUIRE RELIEF UNDER RULE 60(b)(6), WHERE PETITIONER'S STATE REMEDIES ON THE DOUBLE JEOPARDY ISSUE ARE EXHAUSTED, AND DENIAL OF THE RELIEF SOUGHT HEREIN WOULD RESULT IN EXTREME HARDSHIP FOR THE PETITIONER. U.S. Const. Amends. V, XIV; Fed.R.Civ. Proc. Rule 60(b)(6).

Generally, when a defendant has moved for a mistrial the Double Jeopardy Clause does not bar the state from retrying him. The Supreme Court, however, has recognized a narrow exception to that rule. In United States v. Dinitz, 424 U.S. 600 (1976), the Court stated:

"The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith conduct by judge or prosecutor' threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict.'"

424 U.S., at 611 (citation omitted)

Dinitz represented an amplification of earlier decisions suggesting application of the doctrine. See United States v. Tateo, 377 U.S. 463, 468, n. 3 (1964) ("If there were any intimation in a case that prosecutorial or judicial impropriety

justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain"). See also United States v. Jorn, 400 U.S. 470, 485 (1971) ("bad faith" prosecutorial misconduct or "judicial overreaching" that provokes a defendant to move for a mistrial may bar a retrial).

In Oregon v. Kennedy, 456 U.S. 667 (1982), a sharply divided Court established the present standard governing double jeopardy challenges after the defendant has moved for a mistrial. The Court held that:

"Only where the government conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial"

456 U.S., at 676.

The Court explained its rationale as adopting:

"[A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system. When it is remembered that resolution of double jeopardy questions by state trial courts are reviewable not only within the state court system, but in the federal system on habeas corpus as well, the desirability of an easily applied principle is apparent."

456 U.S., at 675 (emphasis supplied)

Since the Oregon trial court and the Oregon Court of Appeals found that the termination of the first trial was not intended

by the prosecutor, the Kennedy Court reversed and remanded the case for further proceedings.

United States v. Sterba, 22 F.Supp.2d 1333 (M.D.Fla. 1998) is analagous to the case at bar. The government had their key informant take the stand using the fictitious name "Gracie Greggs." After both parties rested, the defendant learned that "Greggs" real name was Adria Jackson. Based on the government's deception, the defendant successfully moved for a mistrial. A subsequent investigation uncovered Jackson's sordid history and a trove of impeachment material (22 F.Supp.2d at 1338-39).

The defendant then moved to bar a retrial under the Double Jeopardy Clause. Although part of the "analytical problem is that the prosecutor's intent was to 'get away with it' and remain unencumbered in her efforts" (id., at 1341-42), the Sterba court found "[a] series of conclusions that fundamentally implicate the fifth amendment's immunity from double jeopardy." Id., at 1342.

"[E]ven after Kennedy, intentional misconduct that, if known, is obviously sufficient to provoke a motion for mistrial by the defense constitutes 'goading,' especially if it intrudes into the unfettered exercise of a constitutional guarantee as essential as the right of confrontation. In this case, the prosecutorial plan was avowedly intentional, obviously adulterated, and irresistibly provocative of a motion for mistrial"

* * * *

"As a result of the prosecutorial plan in this case, the [government] required the defense to present its case ... and otherwise leveraged the defendant into the position of revealing his strategy, his theories, his evidence, and his cross-examination. All the while the prosecutor harbored a secret."
22 F.Supp.2d at 1342 (emphasis in original)

The Second Circuit has endorsed the extension of Kennedy to cases where the prosecutorial misconduct is not discovered until the post-verdict stage where relief is obtained on appeal. See United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), where the Court stated:

"[I]f Kennedy is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction."

979 F.2d at 916.

See also United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993).

In the case at bar, there is no question that the prosecutorial misconduct was "avowedly intentional, obviously adulterated, and irresistibly provocative of a motion for a mistrial" (Sterba, supra, at 1342). The record is clear that Broderick was determined to prove a sexual assault on the person of Amy Smith in this case. On the eve of trial Broderick learned that there was no evidence of any semen in Smith's rectum, and so lost the evidence he believed he needed "to prove the sexual assault" (Trial Tr. 750, 553 F.3d at 234-35).

Broderick explained his problem to Dr. Levine, the forensic dentist he had retained to examine the bite mark evidence, who referred him to Richard Walter. Although Broderick spoke with Walter for almost an hour approximately

approximately two weeks before the trial began, and spoke with him again a day or two later when Walter called him back and told him he believed "picquerism" was involved. Yet Broderick never informed the defense of Walter's assessment, nor his intention to call Walter to the stand until the day before he testified (553 F.3d at 235).

The record strongly suggests that Broderick knew Walter's credentials were exaggerated or intentionally misleading. Yet Broderick readily elicited Walter's qualifications, including his claim to have handled some 10,000 profiles for the Los Angeles County Medical Examiner--an improbable number that Broderick later acknowledged was "extraordinary" (Broderick Dep. I at 41-42). Broderick also crafted his questioning to convey the false impression that Walter's work had been validated through publication even though he knew the truth to be otherwise (553 F.3d at 243).

Broderick stood silent while Walter falsely testified that he "first became substantively involved with the case the night before, when he arrived in Buffalo, looked at some exhibits, talked with the prosecutor, and based his testimony 'upon that and that alone.'" (553 F.3d at 242)

Broderick knew this portion of Walter's testimony was false because it related to conversations Broderick actually had with Walter. Had Broderick revealed to the trial court and defense counsel that he had spent almost an hour discussing the case with Walter two weeks before trial, and received the

"picquerism" assessment from Walter within a day or two of the call "... defense counsel would have had a much stronger argument for a continuance or exclusion of Walter's testimony." 553 F.3d at 245.

The prosecutor knew Walter "had two weeks to conjure up his quackery" (553 F.3d at 244). Walter then inflicted inestimable damage to the defense case, tailoring the symptoms of "the fictive syndrome called picquerism ... to remedy any potential weaknesses in the prosecution's theory of Drake's motive" (id.). Walter explained away the absence of any seminal fluid; the lack of penetration anywhere with the penis; he bolstered the testimony of other prosecution witnesses, and the prosecutor's theory of a post-mortem sexual assault, explaining that picquerists "have to kill first"; Walter told the jury the case was clearly a "lust murder" and introduced prejudicial terms like "sniperism," "suckling marks" and "anal assault" (Trial Tr. 793-94, 797-805; 553 F.3d at 236-37, 244).

Broderick's misconduct in presenting Walter's false testimony, his failure to correct answers he knew were false or at least misleading, and his efforts to conceal the truth from the trial court and defense counsel were clearly provocative of a mistrial had the defense discovered the truth in time to act.

No rational prosecutor could expect--had such a deliberate and adulterated scheme to deceive the court, jury and the defendant been discovered prior to the verdict--that a motion

for a mistrial would not be made.

Thus, no distinction should be drawn simply because the defense discovered Broderick's misconduct after the verdict. See United States v. Wallach, supra, 979 F.2d at 916; see also Lockhart v. Nelson, 488 U.S. 33, 36, n. 2 (1988) (Suggesting a bar to a second sentencing hearing if the prosecutor knew of a pardon defendant received on a prior conviction, which was used for an enhanced sentence, and was attempting to deceive the court).

Broderick's misconduct was intentional and clearly would have "goaded" the defense into moving for a mistrial on that basis had it been discovered before the verdict.

The record also supports petitioner's argument that the prosecutor engaged in the intentional misconduct to prevent an acquittal he actually believed likely to occur in the absence of Walter's perjured testimony. As the Court of Appeals observed in Drake, II,

"The prosecutor virtually conceded the materiality of Walter's testimony in acknowledging that he called Walter to compensate for problems revealed with his theory of the case after it turned out that there was no evidence of semen in Smith's rectal cavity. Walter's testimony filled the gap in the prosecution's theory of intent with a sensationalistic and pseudo-scientific explanation of motive. As we observed in Drake I, 'the jury was likely to be impressed (if not inflamed) by testimony that the defendant was a 'picquerist' who killed, mutilated, and abused his victims to satisfy a warped sexual urge.' 321 F.3d at 346. In response to

defense counsel's objection at trial that Walter was 'a breath away' from proclaiming Drake guilty, Broderick pointed out that, in light of Walter's testimony, it was impossible to 'avoid the analogy that in fact the defendant is the killer in a one-issue case.' Trial Tr. at 818, 824."

553 F.3d at 245 (emphasis supplied)

From his opening, Broderick promised the jury evidence of a postmortem sexual assault as evidence of defendant's motive and, thus proof that he shot Smith and Rosenthal intentionally (Trial Tr. 38).

Yet on the eve of trial Broderick knew his case for a sexual assault on Smith was in trouble when he confirmed there was no semen on Smith. As the case unfolded at trial, subject to petitioner's right to cross-examination, the evidence simply failed to establish that Smith was sexually assaulted after she died. Dr. Lloyd, the pathologist who performed Smith's autopsy, said of the bite mark on Smith's left breast, that she observed bruising present that was caused by hemorrhage (Trial Tr. 507).

Although Dr. Uku and Dr. Levine expressed opinions that there were bite marks inflicted postmortem, the flawed aspects of their assessments were described by the Court of Appeals:

"[D]r. Uku's examination occurred after the body was exhumed more than one month after the crime. The basis for his conclusion was the lack of white blood cells or broken blood vessels around the injury. But he testified on cross examination that it was possible that 'a trauma inflicted within an hour of death might also show a lack of white blood cells,' id. at

658, and that a lack of broken blood vessels could also indicate a pre-mortem trauma that was not severe, id. at 654-55. Dr. Levine, who also testified that the bite marks were inflicted post-mortem, was not a pathologist and the basis for his opinion was Dr. Uku's examination."

553 F.2d at 246.

Dr. Nguyen, the physician who first examined Smith, found her anus to be dilated and observed a bruise on the interior wall of Smith's rectum. But Dr. Nguyen was not a pathologist and had never before performed a rape examination on a dead person. "Dr. Nguyen could not testify as to the cause of the anal dilation, or whether the bruising had occurred pre-or postmortem. * * * This evidence does not compel the conclusion that sexual assault occurred; it may have resulted when Drake dropped Smith's body on the ground as he attempted to move her body to the trunk of the car." 553 F.3d at 245.

Broderick simply could not establish the sexual assault theory by competent proof, and "[t]he evidence of any prior connection between Drake and Rosenthal was extremely thin." 553 F.3d at 246.

The remainder of the physical proof was entirely consistent with petitioner's statement that the shooting deaths were accidental, and that in a fit of panic he stabbed Rosenthal, who died as a result of the gunshot wounds.

There was evidence that petitioner could have discharged all 19 shots from the .22 semi-automatic rifle in as little as 3 to 4.5 seconds. The lighting conditions in the area where the shooting occurred were described as "poor" (Trial Tr. 225, 233).

Numerous law enforcement officers testified that the Dump area, where petitioner was headed with his guns and which was immediately adjacent to where the shooting occurred, was frequently used for hunting and target shooting. The area was littered with derelict construction equipment and debris that was riddled with gunfire. Petitioner's own investigator, a former state trooper, found evidence of small caliber gun discharge within 50 yards of where the shooting occurred (Trial Tr. 886-888). All of the police witnesses described Rosenthal's rusty 1969 Chevy Nova as being in poor condition. See 553 F.3d at 246-247.

With the benefit of seeing his entire case unfold at trial, Broderick was justifiably fearful of an acquittal on the intentional murder charges because the physical evidence was consistent with petitioner's statement, and the medical evidence did not establish a post-mortem sexual assault.

Broderick grappled with the issue of motive--trying to answer why a 17 year-old youth would intentionally shoot two people to death for no apparent reason. With his sexual assault theory floundering, Broderick reached out to Richard

Walter, a charlatan and a perjurer, whom he used to portray petitioner as a "picquerist ... a sexual degenerate or some kind of ghoul ... who killed, mutilated, and abused his victims to satisfy a warped sexual urge." Drake I, 321 F.3d at 346.

Broderick used Walter's adulterated creativity to adapt a fictitious syndrome "[t]o remedy any potential weaknesses in the prosecution's theory of Drake's motive ..." (553 F.3d at 244), and negate the effective defense offered by the petitioner.

Broderick's deliberate misconduct placed him in a "no-lose" situation. Walter's extremely prejudicial testimony virtually guaranteed a conviction for intentional murder and made it untenable for the defense to continue the proceeding.

Had a mistrial been granted, Broderick still succeeded by denying petitioner the opportunity to win an acquittal he believed likely to occur in the absence of Walter's testimony. No doubt a retrial would have been sought affording the prosecution a second chance at conviction and an opportunity to correct the weaknesses in their case that were exposed in the first trial.

The protections afforded under the Double Jeopardy Clause require a bar to retrial in this case. As Justice Stevens wrote in the opinion concurring in the judgment in

Oregon v. Kennedy, supra,

"[A]bsent a bar to reprosecution, the defendant would simply play into the prosecutor's hands by moving for a mistrial. The defendant's other option-to continue the tainted proceeding-would be no option at all if, as we might expect **given the prosecutor's intent, the prosecutorial error has virtually guaranteed conviction. There is no room in the balance of competing interests for this type of manipulation of the mistrial device.** Or to put it another way, whereas we tolerate some incidental infringement upon a defendant's double jeopardy interests for the sake of society's interest in obtaining a verdict of guilt or innocence, **when the prosecutor seeks to obtain an advantage by intentionally subverting double jeopardy interests, the balance invariably tips in favor of a bar to reprosecution.**"

456 U.S. at 686 (emphasis supplied, footnote omitted)

The Appellate Division's decision which denied petitioner's double jeopardy claim was based on an unreasonable determination of the facts in light of the evidence in the record, and resulted in an unreasonable application of clearly established Federal law.

The state courts summary rejection of petitioner's double jeopardy prohibition proceeding cannot be reconciled with the established facts in the case and the applicable law.

As so clearly demonstrated by the findings of the Second Circuit Court of Appeals, and set forth in the moving

petition, Broderick deliberately put a perjurer on the witness stand and misled the trial court and defense counsel to prevent its discovery.

The prosecutorial misconduct was certainly intentional. The only remaining issue is whether Broderick's actions were done to goad the defendant into moving for a mistrial or to otherwise subvert the protections of the Double Jeopardy Clause.

Arguably, like the Sterba case, it may be said that Broderick's intent was "to get away with it," passing off Walter as a well-credentialed expert who properly evaluated petitioner as manifesting the "picquerism syndrome." But the prosecutor took an enormous gamble that Walter would not be unmasked as a fraud and his deception exposed. Like the court in Sterba, supra, found, such misconduct is properly viewed as "goading" within the meaning of that term. Broderick had to expect that defense counsel would move for a mistrial, and Judge DiFlorio would have been compelled to grant one, if the truth were discovered about Walter before the verdict.

Moreover, the facts and circumstances leading to and surrounding the presentation of Walter's bogus expert testimony demonstrate that Broderick knowingly used Walter's false testimony to deny petitioner the opportunity to win an acquittal on the intentional murder charges that he believed likely to occur absent Walter's testimony.

To require greater proof on the issue could well make the burden insurmountable given the obvious difficulty obtaining proof on such matters. As Justice Stevens observed in his opinion concurring in the judgment in Oregon v. Kennedy, supra,

"It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant."

456 U.S. at 688.

On this record, the Appellate Division's terse findings of fact and conclusion of law were clearly unreasonable and contrary to clearly established Federal law.

This Court has jurisdiction to grant relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure; justice and the extraordinary circumstances of this case warrant the relief sought.

The double jeopardy claim now before this Court is explicitly interwoven with the perjury claim that the Court of Appeals granted conditional habeas relief on in this matter.

At the time this case was before the Court of Appeals, however, the issue of whether the prosecutor's misconduct implicated the protections of the Double Jeopardy Clause was not raised because it had not been first exhausted in the

state courts (see, DiSimone v. Phillips, 518 F.3d at 124 [2d Cir. 2008]).

Justice requires relief for the petitioner who has been imprisoned for over 28½ years on a conviction that was deliberately tainted by perjured evidence in an effort to deprive him of the protection of the Double Jeopardy Clause by denying petitioner of the opportunity to win an acquittal that Broderick believed likely absent Walter's false and inflammatory testimony.

Rule 60(b) "[v]ests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615 (1949); see also LeBlanc v. Cleveland, 248 F.3d 95, 100-101 (2d Cir. 2001) ("Rule 60(b)(6) should be liberally construed when substantial justice will thus be served.").

Rule 60(b)(6) was examined in United States v. Cirami, 563 F.2d 26 (2d Cir. 1977), where the court stated:

"Clause (6) ... has been described by Professor Moore as a 'grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceeding clauses,' 7 Moore's Federal Practice p 60.27[2], at 375 (2d ed. rev. 1975), which, in a proper case, is to be 'liberally applied.' Id. at 352. It is well established, however, that a 'proper case' for Rule 60(b)(6) relief is only one of 'extraordinary circumstances,' Ackermann v. United States, 340 U.S. 193, 199, 95 L.Ed. 207, 71 S.Ct. 209 (1950), or 'extreme hardship,' United States v. Karahaiias, supra at 333."

563 F.3d at 32.

In Davis v. Pitchess, 388 F.Supp 105 (C.D.Cal. 1974), aff'd 518 F.2d 141 (9th Cir.), rev'd on other grounds 421 U.S. 482 (1975), the court invoked Rule 60(b)(6) and amended a judgment to grant an unconditional writ of habeas corpus after it was learned that the evidence withheld from the defense, which formed the basis for granting the conditional writ, had been destroyed. The court held:

"Here, petitioner has exhausted his state remedies, and more importantly the issues which he now raises are explicitly interwoven within the due process claim that caused this court and the Ninth Circuit to grant and approve the conditional writ. * * * Further, the petitioner here is seeking to obtain the relief to which he would have been entitled originally if this court had been made aware then of the true facts."

388 F.Supp at 108 (citing 7, Moore, Federal Practice 60.22 pp. 246-247)

The Supreme Court reversed Davis v. Pitchess, supra, because it found the prohibition proceedings Davis utilized in the state courts to exhaust his claim were inadequate because under California law prohibition is an extraordinary remedy available in limited circumstances, and did not afford adequate review.

Importantly, that is not the case here. New York has expressly approved review of double jeopardy claims through the prohibition proceeding. See Matter of DiLorenzo v. Murtagh, 36 N.Y.2d 306 (1975); Matter of Abraham v. Justices of New York Supreme Court of Bronx County, 37 N.Y.2d 560

(1975); Scranton v. Supreme Court of State of New York, 36 N.Y.2d 704 (1975); cf., Abney v. United States, 431 U.S. 651, 662 (1977) (interlocutory appeal allowed to raise double jeopardy claim against retrial).

Because petitioner's double jeopardy claim was considered on the merits, denied and appeal was sought in New York's highest court, the exhaustion requirement of 28 U.S.C. § 2254 is satisfied.

No part of the Second Circuit's decision and mandate in this matter expressly or implicitly addressed the double jeopardy claim now before this Court. While "[t]he trial court must adhere to the decision and mandate of the appellate court there is the corollary that upon remand the trial court may consider matters not expressly or implicitly part of the decision of the court of appeals. * * * This is true also at a later stage in the litigation where the case is again before the trial court not on remand but, for example, on a new motion to vacate judgment." United States v. Cirami, supra, 563 F.2d at 33. See also DeWeerth v. Baldinger, 38 F.3d 1266, 1270 (2d Cir. 1993); Davis v. Pitchess, 518 F.2d 141 (9th Cir. 1974) ("It was not necessary for the District Court to seek leave of this Court to entertain the motion simply because of the affirmance on appeal, for the motion raised a matter not within the scope of the mandate of this Court. See 7 Moore, Federal Practice 426." 518 F.2d at 142).

To the extent this Court were to reach an opposite conclusion as to the effect of the Second Circuit's mandate, this Court is urged to seek leave from the Court of Appeals to grant the motion.

No other procedural remedy is available to grant the relief that justice and the extraordinary circumstances of this case require.

Were this Court to recharacterize this motion as a petition for habeas corpus under § 2254, respondent state would no doubt argue that it counted as a "first" petition against the judgment to be imposed upon the March 23, 2010 convictions after retrial.

Obviously, if petitioner's double jeopardy claim is successful he would be entitled to immediate release from custody. Requiring petitioner to wait until his state court appeals, and any collateral attacks he may file, to be completed prior to consideration of the double jeopardy claim would work an extreme hardship for petitioner who has already been imprisoned for 28½ years. His prior state court appeal took approximately 5 years to be completed, and his CPL § 440.10 motion took an additional 4 years to be exhausted. As the state courts have already rejected petitioner's double jeopardy challenge on the merits, the only relief he can seek is a reversal of the convictions.

Moreover, the double jeopardy claim raised in this motion does not, per se, attack the convictions from the March 23, 2010 verdict. Rather, the double jeopardy claim attacks the judgment of the Appellate Division entered April 7, 2009, which dismissed petitioner's double jeopardy claim. For that reason it should not be construed as counting as a "first" petition attacking the March 23, 2010 convictions (see, Vasquez v. Parrott, 318 F.3d 387 [2d Cir. 2002]).

The extraordinary circumstances of this case require relief. The prosecutor harbored the secret of his misconduct with Walter for many years. When petitioner finally exposed it in 1995, the prosecution vehemently opposed petitioner's efforts for collateral relief for **14 more years**. The delay obviously caused great anxiety and hardship for petitioner.

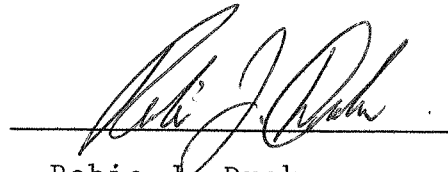
Although not the subject of this motion, the due process implications of retrying a case after 27 years, and the prejudice attendant to the petitioner are obvious. Medical slides crucial to petitioner's defense of the sexual allegations were lost or destroyed. Almost half of the original witnesses were deceased or otherwise "unavailable" for cross examination, of particular impact because documents unavailable to petitioner's original trial counsel were subsequently uncovered. The scene where the incident occurred had greatly changed and was no longer feasible to view.

Conclusion

For all of the above-stated reasons, petitioner Robie J. Drake asks this Court to reopen the judgment under Rule 60(b)(6), amend the judgment to unconditionally grant the writ of habeas corpus and Order petitioner discharged because the prosecution violated his rights under the Due Process Clause, and grant such other and further relief as this Court may deem just and proper.

Dated: May 26, 2010,
Lockport, New York.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Robie J. Drake', is written over a horizontal line.

Robie J. Drake,
petitioner, pro se
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE DRAKE, 82-B-2329,

Petitioner,

-v-

99-CV-681 (S)

L. A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility,

Memorandum of Law

Respondent.

In connection with the above referenced matter, please allow this to serve as the respondent's Memorandum of Law in opposition to petitioner's Motion for Relief under Federal Rules of Civil Procedure 60 (b) (6).

Petitioner was convicted in Niagara County Court on December 1, 1982, of two counts of second degree murder. Petitioner eventually filed a petition for habeas corpus relief. The Second Circuit Court of Appeals conditionally granted the petition and ordered petitioner's release unless a new trial was held within 90 days. *Drake v. Portuondo*, 553 F.3d 230, 247 (2009). After further extensions of the time for the re-trial, a trial was held and petitioner was convicted, once again, of two counts of second degree murder and judgment was entered in Supreme Court, Niagara

County, on May 27, 2010.

Petitioner's Motion for Relief requests this Court to vacate the second judgment of conviction on the ground that the re-trial was barred under the federal Double Jeopardy Clause and *Oregon v. Kennedy*, 456 U.S. 667 (1982). According to petitioner, the prosecutor at the first trial believed an acquittal was likely to occur due to the "loss" of the rectal sperm evidence and he sought to poison the jurors through the use of a phony expert he knew to be committing perjury. See Drake Affidavit in Support at ¶ 45.

Petitioner's motion is meritless. In addition to the motion's procedural defects – successive petition, claims not exhausted, failure to raise appellate claims – the motion does not stand on clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Clearly established federal law involves the holdings of the United States Supreme Court and not its dicta. *Id.* at 412. No United States Supreme Court case has ever held that the Double Jeopardy Clause would bar retrial where no successful motion for a mistrial was made during the trial. In fact, the Supreme Court recognized in *Oregon v. Kennedy* that "if a mistrial were in fact warranted under the applicable law, of course,

the defendant could in many instances successfully appeal a judgment of conviction on the same grounds that he urged a mistrial, and the Double Jeopardy Clause would present no bar to retrial.” In short, there is no cognizable Double Jeopardy Clause claim.

The Motion for Relief should be denied.

Dated: May 27, 2010
Lockport, New York

Respectfully submitted,

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To: CLERK,
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE DRAKE, 82-B-2329,

Petitioner,

-v-

99-CV-681 (S)

L. A. PORTUONDO, Superintendent,
Shawangunk Correctional Facility,

Certificate of Service

Respondent.

I hereby certify that on June 8, 2010, I electronically filed the foregoing Memorandum with the Clerk of the District Court using its CM/ECF system which would then electronically notify the following CM/ECF participant in this case:

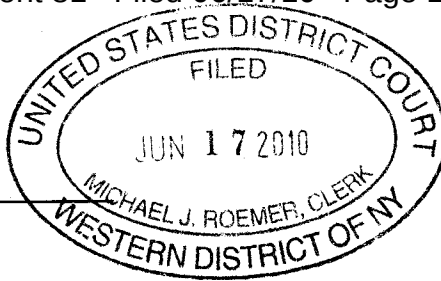
None

and I hereby certify that I have mailed the foregoing by United States Postal Service to the following non CM/ECF participants:

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s/Thomas H. Brandt
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



ROBIE J. DRAKE,

Petitioner,

99-CV-681(S)

-v-

L.A. PORTUONDO,

REPLY
MEMORANDUM

Respondent.

Petitioner Robie J. Drake respectfully submits this memorandum in reply to the memorandum of the above-named respondent, dated May 27, 2010, which opposed petitioner's motion for relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Respondent submits that "there is no cognizable Double Jeopardy Clause claim" because no Supreme Court decision has ever barred a retrial "where no successful motion for a mistrial was made during the trial" (Respondent's Memorandum at pp 2-3). Petitioner disagrees. Under Oregon v. Kennedy, 456 U.S. 667 (1982), the touchstone of a double jeopardy inquiry is whether there was an "intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." 456 U.S. at 676 (emphasis supplied).

To read Oregon v. Kennedy, supra, as requiring the successful declaration of a mistrial as a prerequisite to a defendant invoking the bar of double jeopardy would emasculate the Double Jeopardy Clause and render it a "hollow shell" (id., 456 U.S. at 673).

A trial court entertaining a motion for a mistrial and apprehending that the prosecutor's intentional misconduct goaded the defense into moving for a mistrial, and being "loath to grant" the same, could simply "rubber stamp" the application and thus forever insulate the prosecutor's misconduct from being challenged as a bar to a successive prosecution. Such a result cannot be reconciled with the Supreme Court's decisions recognizing that the Double Jeopardy Clause protects defendants from retrial where the record demonstrates that the intent of the prosecutor was to subvert the very protection afforded by the Clause, i.e., the valued right of the defendant to have his case adjudicated by a particular tribunal, and the anxiety and hardship of successive retrials.

As the Second Circuit recognized in United States v. Wallach, 979 F.2d 912 (1992),

"[I]f Kennedy is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction."

979 F.2d at 916 (emphasis supplied); see also United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993).

Because the respondent's reading of Oregon v. Kennedy, supra, would nullify the protection of the Double Jeopardy

Clause to any defendant who was not granted a mistrial, regardless of the intent surrounding the prosecutor's misconduct, the Court is urged to reject it and the argument that AEDPA requires such an anomalous result.

As stated in Panetti v. Quarterman, 551 U.S. 930, 168 L.Ed.2d 662 (2007), "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' Carey v. Musladin, 549 U.S. 70, ____." 166 L.Ed.2d 482, 492 (Kennedy, concurring). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.' Lockyer v. Andrade, 538 U.S. 63, 76." 168 L.Ed.2d at 682.

Because petitioner's right to be free from prosecutorial misconduct intended to subvert the protections afforded him under the Double Jeopardy Clause are clearly established, and the Appellate Division's decision rejecting petitioner's double jeopardy claim was unreasonable on the record before it, AEDPA does not prohibit this Court from finding that the state courts erred by dismissing petitioner's application to bar a retrial on double jeopardy grounds.

Respondent also briefly alludes to "the motions procedural defects-successive petition, claims not exhausted, failure to raise appellate claims ..." (Respondent's Memorandum at p. 2). None of these claims have merit.

As previously set forth in petitioner's memorandum of law and moving affidavit, the double jeopardy claim is explicitly interwoven with the perjury claim that the Court of Appeals granted habeas relief upon. Yet at the time the perjury claim was adjudicated, the double jeopardy claim had not been raised or exhausted in the state courts because the state courts rejected the perjury claim on an incomplete record (see Drake v. Portuondo, 553 F.3d 230, 239; see also 321 F.3d at 345-347). The exhaustion requirement of 28 U.S.C. § 2254 requires the double jeopardy claim to be determined in the first instance by the state courts (see DiSimone v. Phillips, 518 F.3d 124 [2d Cir. 2008]).

Petitioner has duly exhausted the double jeopardy claim in the state courts. Moreover, there is no "successive" petition. Petitioner merely seeks the relief he would have been entitled to in the first instance had all the facts surrounding the prosecutor's knowing use of Walter's perjured testimony been developed while the case was pending before the state courts.

The motion does not, per se, attack the judgment of Supreme Court, Niagara County, entered May 27, 2010, after the retrial (which petitioner submits should be viewed as a nullity in violation of the Double Jeopardy Clause). Rather, the instant motion attacks the judgment of the Appellate Division, Fourth Department, entered April 7, 2009, which denied petitioner's double jeopardy claim. As such, it should not be construed as counting as a "first" petition


attacking the May 27, 2010 judgment (if the motion were construed as a petition at all). See Vasquez v. Parrott, 318 F.3d 387 (2d Cir. 2002).

Rule 60(b)(6) is described as a "grand reservoir of equitable power to do justice in a particular case" United States v. Ciriame, 563 F.2d 26, 32 (2d Cir. 1977) (quoting 7 Moore's Federal Practice p 60.27[2], at 375 (2d ed. rev. 1975)). The prosecutorial misconduct in this case was deliberate and designed to fend off an anticipated acquittal by bolstering a flailing case for an alleged sexual assault and explaining away any flaws or weaknesses in the prosecution's case through perjured and extremely inflammatory testimony. Not only was the constitutional violation particularly egregious because of the severity of the charges against a 17 year old youth, but the prejudice was compounded by the prosecution's vehement efforts to deny petitioner the relief he deserved for over 27 years.

Because the prosecutor intended to subvert petitioner's rights under the Double Jeopardy Clause, and the claim is so interwoven with the perjury claim that the original habeas petition was sustained upon, the motion should be granted.

WHEREFORE, petitioner Robie J. Drake asks this Court to grant the motion for relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Dated: June 14, 2010,
Lockport, New York.


Robie J. Drake
petitioner, pro se

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

99-CV-681(S)

-v-

CERTIFICATE OF SERVICE

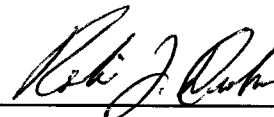
L.A. PORTUONDO,

Respondent.

I, Robie J. Drake, hereby certify under penalty of perjury, that on the 15 day of June 2010, I mailed a true copy of the foregoing Reply Memorandum by United States Postal Service, to the following person who is counsel of record for the respondent:

THOMAS H. BRANDT, ESQ.,
Assistant District Attorney
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094-2740

Executed on: JUNE 15, 2010.



Robie J. Drake,
petitioner, pro se

-PSO-

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE, 82-B-2329,

Petitioner,

-v-

DECISION and ORDER
99-CV-681S

L. A. PORTUONDO,
Superintendent, Shawangunk Correctional Facility,¹

Respondent.

INTRODUCTION

Petitioner Robie J. Drake has filed a motion for relief under Fed. R. Civ. P. 60(b) ("motion to reopen") (Docket No. 77), requesting that the Court reopen and amend the judgment entered on March 4, 2009 (Docket No. 76), which, pursuant to the Mandate issued by the Second Circuit on March 3, 2009 (Docket No. 74), conditionally granted Drake's petition for a writ of habeas corpus and directed that he be released unless the State of New York provided him a new trial within 90 days. For the reasons explained below, petitioner's motion is denied but is recharacterized as a new petition for habeas corpus, pursuant to 28 U.S.C. § 2254.

¹The correct respondent for a § 2254 habeas proceeding is the name of the authorized individual having custody of the petitioner. 28 U.S.C. § 2243. Given that petitioner is now incarcerated in the Clinton Correctional Facility, the correct respondent therefore would be the Superintendent of the Clinton Correctional Facility. In light of petitioner's *pro se* status and the fact that this in no way will prejudice respondent, and in the interests of court efficiency, the Court will deem the petition amended to change the name of respondent to the Superintendent of the Clinton Correctional Facility.

The Clerk of the Court is directed to terminate L.A. Portuondo, Superintendent, Shawangunk Correctional Facility, as respondent, add Superintendent of the Clinton Correctional Facility as the new respondent, and revise the caption of this action accordingly.

PROCEDURAL HISTORY

On December 1, 1982, petitioner was convicted in Niagara County Court of two counts of second degree murder, and sentenced to consecutive terms of imprisonment of 20 years to life. His petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was filed with this Court in 1999, and was dismissed by the Hon. John T. Elfvín in 2001. (Docket Nos. 22, 23). Thereafter, in 2003, the Second Circuit vacated the judgment of dismissal and remanded for discovery on the question of whether the prosecution knew or should have known that its expert witness was committing perjury. *Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2003). On remand, following discovery, Judge Elfvín granted respondent's motion for summary judgment and judgment was issued dismissing the petition. (Docket Nos. 59, 60). Petitioner appealed, and by Opinion issued January 23, 2009, the Second Circuit reversed and remanded "for the entry of judgment conditionally granting the writ of habeas corpus and ordering Drake's release unless the State provides him with a new trial within 90 days." *Drake v. Portuondo*, 553 F.3d 230, 247-48 (2d Cir. 2009). The Mandate of the Second Circuit was filed on March 3, 2009 ("Mandate"), (Docket No. 74), and by Order dated March 4, 2009, this Court ordered, pursuant to the Mandate, that petitioner's petition for a writ of habeas corpus be conditionally granted and that petitioner be ordered released unless the State provided him with a new trial within 90 days. (Docket No. 75). In its March 4 Order, the Court also denied petitioner's motion for an extension of time to begin his new trial, noting that

The Second Circuit explicitly directed the "entry of judgment conditionally granting the writ of habeas corpus and ordering Drake's release unless the State provides him with a new trial within 90 days." Entering judgment accordingly is all this Court is empowered to do. Any requests for extensions of time or a

stay of the Second Circuit's Order must be made to the Second Circuit.

Order entered March 4, 2009, ¶ 3) (Docket No. 75).² Judgment in accordance with the Mandate was entered on the same date. (Docket No. 76).

Before the commencement of the retrial in state court, Drake commenced an Article 78 proceeding in the Appellate Division, Fourth Department, New York State Supreme Court, seeking a writ of prohibition to bar retrial on double jeopardy grounds. (See Docket No. 77, at Exhibits A-C). By Order entered April 7, 2009, the Appellate Division denied petitioner's application for a writ of prohibition (Docket No. 77, at Exhibit F), and his application for leave to appeal was denied by the New York Court of Appeals on September 1, 2009. *Drake v. Kloch*, 13 N.Y.3d 755, 886 N.Y.S.2d 90 (2009).

Thereafter, beginning on March 8, 2010, petitioner was retried in Niagara County Supreme Court before the Hon. Richard Kloch, at the conclusion of which petitioner was again convicted of two counts of second degree murder. (Docket No. 77, ¶ 27). Judgment was entered upon the new convictions on May 27, 2010. (Docket No. 79 at p. 2).

DISCUSSION

Whether the Court retains jurisdiction to reopen the March 4, 2009 Judgment

Petitioner's motion to reopen seeks to have the Court reopen and amend the judgment issued on March 4, 2009, so as to grant the writ of habeas corpus *unconditionally*, and discharge petitioner from custody (Docket No. 77) (Affidavit in Support of Motion for Relief, ¶ 2 and p. 19 ["WHEREFORE" clause]). The motion to

²Petitioner then filed a motion in the Second Circuit for an extension of the 90-day period within which his retrial was to commence, and the Second Circuit twice granted such extensions. See *Drake v. Portuondo*, 06-1365 (2d Cir.), Orders filed March 19 and November 13, 2009.

reopen is based upon petitioner's argument that his retrial was barred by the Double Jeopardy Clause of the Fifth Amendment and the Supreme Court's decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982). (See Docket No. 77 at ¶¶ 16, 28-29 and Docket No. 78 [Petitioner's Memorandum of Law]).³

Petitioner's motion is brought pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, pursuant to which a court may "relieve a party...from a final judgment, order, or proceeding for" a number of enumerated reasons, including "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).⁴ Petitioner claims that under this catch-all provision, "justice and the extraordinary circumstances of this case" require that the judgment "be reopened and amended to grant the writ of habeas corpus unconditionally and order the petitioner discharged from custody on the ground that his continued prosecution and confinement is in violation of the double jeopardy clause of the Fifth Amendment." (Docket No. 78 at p. 3). The arguments in support of petitioner's request for relief under Rule 60(b)(6) and his claim that his double jeopardy rights were infringed

³The gist of petitioner's double jeopardy argument is summarized in his affidavit in support of his motion to reopen as follows:

"That the prosecutor at petitioner's first trial intentionally engaged in egregious prosecutorial misconduct by knowingly offering the false testimony of [expert witness] Richard Walter; manipulated the trial court to prevent defense counsel from discovering the falsehood in time to act; and did so to prevent an acquittal of the intentional murder charges which the prosecutor believed likely to occur in the absence of Walter's perjured testimony, thereby entitling petitioner to the double jeopardy protection under Oregon v. Kennedy [.]"

(Docket No. 77 at ¶ 29).

⁴Petitioner concedes that the other grounds for relief from a final judgment set forth in Rule 60(b), see Rule 60(b)(1)-(5), are not applicable here. (Docket No. 78 at p. 3).

by his retrial are set forth in considerable detail in the motion to reopen and in petitioner's memorandum in support of the motion.

In response to petitioner's Rule 60(b) Motion, respondent filed a memorandum of law in which it argues, in a conclusory fashion, that the motion is procedurally defective ("successive petition, claims not exhausted, failure to raise appellate claims") and substantively without merit. (Docket No. 79 at p. 2).

Amending the judgment issued by this Court on March 4, 2009, so as to grant the writ of habeas corpus *unconditionally*, as petitioner's motion to amend requests, would require that the Court deviate from the Second Circuit's Opinion and Mandate, which directed that the writ be granted *conditionally*. In addition, granting the motion would have the effect of nullifying the retrial and reconviction of petitioner, which took place in New York State Supreme Court in accordance with the terms of the Second Circuit's Mandate and this Court's ensuing judgment, which directed that petitioner be released unless the State provided him a new trial within 90 days.

The Court lacks the authority to grant petitioner the relief he seeks under Rule 60(b)(6). Drake filed his petition under 28 U.S.C. § 2254, which provides that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody *pursuant to the judgment* of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). For federal habeas jurisdiction to exist under § 2254, therefore, a state prisoner must be held pursuant to a state court judgment. However, the state court judgment attacked by petitioner in the instant matter—entered on December 1, 1982, following his first trial in Niagara County Court—is no more, having been vacated as a result

of this Court's March 4, 2009 judgment, issued pursuant to the Second Circuit's Mandate. As chronicled above, following the issuance of the March 4, 2009 judgment, petitioner was retried and convicted of two counts of second degree murder and judgment was entered in New York State Supreme Court on May 27, 2010. While petitioner is unquestionably "in custody pursuant to the judgment of a State court," he is in custody pursuant to the judgment of conviction entered in 2010. The instant habeas case became in essence moot in March 2009, when Drake ceased to be in custody under the December 1, 1982 judgment, at which time this court's jurisdiction ended. See *Eddleman v. McKee*, 586 F.3d 409 (6th Cir. 2010), *reh'g en banc denied*, 2010 U.S. App. LEXIS 3439 (6th Cir. Feb. 9, 2010) (where federal district court granted a conditional writ of habeas corpus, directing that petitioner be released unless timely retried, and State then vacated his conviction and commenced retrial proceedings, the district court lacked jurisdiction to entertain petitioner's motion for the issuance of an unconditional writ barring retrial); *Hayes v. Evans*, 70 F.3d 85 (10th Cir. 1995) (habeas petition dismissed as moot where petitioner was no longer in custody pursuant to conviction that was the subject of the petition, a state court having reversed it, and ordered a new trial); *Leasure v. Johnson*, 3-98-CV-1652-X, 1998 U.S. Dist. LEXIS 23424 (N.D. Tex. Oct. 3, 1998), findings adopted, Oct. 23, 1998 (habeas petition dismissed as moot where petitioner was no longer in custody pursuant to the judgment he sought to attack, his conviction having been reversed and a new trial pending).

In the instant matter, Drake's 1981 conviction having been annulled, this Court no longer has the authority to grant relief from the judgment: "once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254." *Eddelman*, 586 F.3d at 413.⁵

A related reason why the Court lacks the jurisdictional authority to reopen and amend the March 4 judgment has to do with the nature of conditional grants of habeas corpus. "Originally, the courts confined the ultimate relief available in habeas corpus proceedings to orders requiring the petitioner's unconditional discharge from custody. If the legal error proved by the petitioner did not render her current custody illegal, no remedy was available; if the error satisfied that requirement, the courts assumed that they lacked the ability to order a retrial and that they had no choice but to order the prisoner released unconditionally (although often without prejudice to rearrest and retrial)." 2 Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.1 at 1677 (5th ed. 2005) (footnotes omitted). "Today, however . . . the principal form of habeas relief is the 'conditional release order,' which 'only requires release in the event a retrial or other

⁵The fact that the judgment of conviction entered against petitioner in 1981 has been vacated is what prevents Drake's Rule 60(b) motion from being construed as a "second or successive" petition within the meaning of 28 U.S.C. § 2244, as the respondent contends that it is. (Docket No. 79 [Respondent's Memorandum of Law] p. 2.) It is well-established that a Rule 60(b) motion that advances new claims not included in an original § 2254 petition may be treated in substance as a successive petition and subject to the requirements on second or successive petitions by § 2244. See *Gonzalez v. Crosby*, 545 U.S. 524, 531-32, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005); *Kearney v. Graham*, 06-CV-6305 (CBA), 2010 U.S. Dist. LEXIS 77399, at *4 (July 26, 2010) (citing *Crosby*, 454 U.S. at 532).

Even if Drake's Rule 60(b) motion is treated as a petition, "a numerically second petition does not necessarily constitute a 'second' petition for the purposes of the AEDPA." *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002). In this regard, a subsequent petition will not count as a second or successive petition for purposes of § 2244 "unless the second petition attacks the same judgment that was attacked in the prior petition. In other words, two petitions are not successive' under § 2244 merely because they are both brought by the same prisoner. Rather, to be considered 'successive,' a prisoner's second petition must, in a broad sense, represent a second attack by federal habeas petition on the *same conviction*." *Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003) (emphasis added; internal citation omitted). In the instant matter, however, and as more fully explained *infra*, petitioner's Rule 60(b) motion seeks to attack a *different* conviction, namely the second conviction that followed his 2010 re-trial in state court.

action sufficient to cure the violation does not occur within a period of time specified in the order granting the writ.’ *Rosa v. McCray*, 03 Civ. 4643 (GEL), 2004 U.S. Dist. LEXIS 24772, at *12 (S.D.N.Y. Dec. 8, 2004) (*quoting* Hertz and Liebman, § 33.1, at 1499).

“[T]he sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life.” *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir.), *cert. denied*, 549 U.S. 1097, 127 S. Ct. 838, 166 L. Ed. 2d 667 (2006) (citing *Smith v. Lucas*, 9 F.3d 359, 366-67 (5th Cir. 1993); *see also, McQuillion v. Duncan*, 253 F. Supp. 2d 1131, 1134 (C.D. Cal. 2003). “Conditional grants of writs of habeas corpus are final orders, exactly like absolute grants, and they ordinarily and ideally operate automatically, that is, without the need for the district court to act further.” *Gentry*, 456 F.3d at 692. However, federal district courts retain jurisdiction to determine whether a party has complied with the terms of the conditional order. *Id.*; *see also, Phifer v. Warden*, 53 F.3d 859, 864-65 (7th Cir. 1995). Accordingly, “[w]hen the state fails to cure the error, *i.e.*, when it fails to comply with the order’s conditions, ‘[a] conditional grant of a writ of habeas corpus *requires* the petitioner’s release from custody.’” *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006) (quoting *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985)). “On the other hand, when a state meets the terms of the habeas court’s condition, thereby avoiding the writ’s actual issuance, *the habeas court does not retain any further jurisdiction over the matter.*” *Gentry*, 456 F.3d at 692 (citing *Pitchess v. Davis*, 421 U.S. 482, 490, 95 S. Ct. 1748, 44 L. Ed. 2d 317 (1995)) (emphasis added); *see also, Osborn v. Shillinger*, No. 90-8047, 1991 U.S. App. LEXIS 10626, at *5-6 (10th Cir. Apr. 24, 1991) (unpublished)

(affirming dismissal of petition for writ of mandamus ordering petitioner's release on speedy trial grounds where district court did not retain jurisdiction after conditional habeas corpus was granted, and state subsequently initiated reprosecution of petitioner) (citing *Pitchess*, 421 U.S. 490); *Cooper v. Louma*, 04-CV-74790-DT, 2007 U.S. Dist. LEXIS 50798, at *2-3 (E.D. Mich. July 13, 2007) ("[T]he Court is reluctant to vacate its opinion and order granting a conditional writ of habeas corpus. As noted, conditional grants of the writ of habeas corpus are final orders. The reason that conditional orders are ordinarily considered final is that they generally terminate proceedings between the parties. The Court has no further jurisdiction in this matter because the terms of the Court's prior opinion and order have been satisfied." (citing *Gentry*, 456 F.3d at 692) (internal quotation omitted)).

In *Pitchess v. Davis*, *supra*, the Supreme Court held that Rule 60(b) does not, either alone or in conjunction with 28 U.S.C. § 2254, authorize a district court to retain jurisdiction to change its grant of a conditional writ of habeas corpus to an absolute writ, as petitioner would have this court do in the instant matter: "Neither Rule 60 (b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court." 421 U.S. at 490; *see also*, *Osborn*, 1991 U.S. App. LEXIS 10626, at *5 ("While [petitioner] is correct in his assertion that the district court had jurisdiction to grant habeas corpus relief, the district court did not retain jurisdiction *after* habeas relief was granted.") (citing *Pitchess*) (emphasis in original).

As noted above, the Second Circuit's January 23, 2009 decision in this matter directed that this Court enter judgment *conditionally* granting Drake a writ of habeas corpus

and ordering his release unless the State provided him with a new trial within 90 days. In accordance with the Second Circuit's decision and ensuing Mandate, this Court directed, in its March 4, 2009 Order, that the petition be conditionally granted and that petitioner be released unless the State provided him with a new trial within 90 days. The condition set forth in the Court's March 4 Order, viz., that the State provide petitioner a new trial within 90 days, has, as described above, been satisfied. Accordingly, the Court retains no further jurisdiction over this habeas petition. See *Pitchess*, 421 U.S. at 490, *Gentry*, 456 F.3d at 692; *Cooper*, 2007 U.S. Dist. LEXIS 50798, at *3.

Petitioner's Rule 60(b) Motion in substance is a new habeas corpus petition

Although petitioner seeks to cast his application for relief as a further attack upon his 1982 conviction, it is clear that in substance his Rule 60(b) motion is properly characterized as a *new* § 2254 petition, which seeks to vacate his 2010 conviction on double jeopardy grounds. To begin with, as explained above, petitioner's 1982 conviction has been annulled. Petitioner is "in custody pursuant to the judgment of a State court" within the meaning of § 2254(a), but the State court judgment pursuant to which he is incarcerated is the 2010 judgment of conviction, entered following his retrial.

That Drake's motion seeks to attack the judgment of conviction resulting from his 2010 retrial is evidenced by the nature of the claim set forth in his motion and supporting papers. Petitioner explicitly argues that his Fifth Amendment rights were violated when the Appellate Division of the New York Supreme Court denied his application, made immediately before his retrial, pursuant to Article 78 of the New York C.P.L.R., for a writ of prohibition seeking to prevent his retrial on double jeopardy grounds. (Petitioner's Reply Memorandum [Docket No. 81] at p. 4) ("[T]he instant motion attacks the judgment of the

Appellate Division, Fourth Department, entered April 7, 2009, which denied petitioner's double jeopardy claim.""). The Appellate Division's denial of petitioner's application for a writ of prohibition was the predicate for his retrial to proceed: had the Appellate Division granted the application, the State would have been prohibited from re-prosecuting petitioner, and there would be no basis or need for petitioner to now seek, as he does, to have this Court discharge him from custody. Consequently, petitioner's challenge to the Appellate Division's decision is properly regarded as a ground for relief with respect to his 2010 conviction.

Petitioner's papers clearly anticipate the possibility that the Court might construe the motion to reopen as a new petition for habeas corpus. In this regard, petitioner states that "even if this Court were to indicate that it would recharacterize this Rule 60(b)(6) motion as a petition for habeas corpus under 28 U.S.C. § 2254, this motion/petition should not count as 'first' petition attacking the judgment of conviction resulting from the second trial in March 2010," because "[w]hile this motion certainly concerns the same arrest and the same criminal charges, it only challenges the decision and order of the Appellate Division which rejected petitioner's double jeopardy claim and allowed him to be tried under the same indictment." (Docket No. 77, ¶ 37). Similarly, in petitioner's reply to the respondent's memorandum in opposition to his motion to reopen, he asserts that the motion should not be characterized as a petition seeking to challenge the judgment of conviction rendered after the 2010 retrial:

The motion does not, per se attack the judgment of [the] Supreme Court, Niagara County, entered May 27, 2010, after the retrial (which petitioner submits should be viewed as a nullity in violation of the Double Jeopardy Clause). Rather, the instant motion attacks the judgment of the Appellate Division, Fourth Department, entered

April 7, 2009, which denied petitioner's double jeopardy claim. As such, it should not be construed as counting as a "first" petition attacking the May 27, 2010 judgment (if the motion were construed as a petition at all).

(Docket No. 81, pp. 4-5). Petitioner's attack upon the Appellate Division's decision denying his application for an order prohibiting his retrial cannot, as petitioner desires, be considered by this Court separate and apart from the retrial and conviction that followed the Court's denial of his application. This Court does not have at-large authority to review the decisions of state courts in criminal matters outside the context of a properly presented habeas corpus petition. See, e.g., *Alvarez v. Scully*, 833 F. Supp. 1000, 1005 (S.D.N.Y. 1993) ("Federal courts have no supervisory authority over state courts, and federal habeas corpus review of state criminal proceedings under 28 U.S.C. § 2254 is limited to errors of constitutional magnitude.") (citations omitted).

It is well-established that "the nature of a motion is determined by its substance and not the label attached to it[.]", *Rosado v. Johnson*, 589 F. Supp. 2d 398, 400 (S.D.N.Y. 2008) (internal citations omitted). The Courts have applied the substance-over-form approach to treat a mislabeled petition, complaint or motion as petitions for relief under 28 U.S.C. § 2254, where such petition, complaint, or motion seeks in substance to vacate or set aside a conviction or otherwise challenge the constitutionality of a prisoner's custody pursuant to a state court judgment. See, e.g., *Cook v. New York State Div. of Parole*, 321 F. 3d 274, 277 (2d Cir. 2003) ("[I]f an application that should be brought under 28 U.S.C. § 2254 is mislabeled as a petition under section 2241, the district court must treat it as a section 2254 application instead.") (citation omitted); *James v. Walsh*, 308 F. 3d 162, 166 (2d Cir.2002) ("[I]t is the substance of the petition, rather than its form, that" governs);

Dennis v. People, 09-CV-4644 (SLT), 2010 U.S. Dist. LEXIS 24376 (E.D.N.Y. Mar. 16, 2010) (where review of a "misabeled motion" filed by a *pro se* petitioner revealed that he was seeking to vacate a state court conviction, the motion would be recharacterized as a petition pursuant to 28 U.S.C. § 2254); *Spillman v. Cully*, 08-CV-0008M, 2008 U.S. Dist. LEXIS 13196 (W.D.N.Y. Feb. 15, 2008) (recharacterizing complaint filed under 42 U.S.C. § 1983 as a habeas corpus petition pursuant to 28 U.S.C. § 2254 where it sought to challenge plaintiff's detention).

Review of petitioner's motion herein reveals, as explained above, that notwithstanding its labeling as a motion to reopen and amend the judgment issued by the Court on March 4, 2009, it is, in substance, a petition for a writ of habeas corpus that seeks to attack his 2010 convictions resulting from his retrial in New York State Supreme Court, and should be recharacterized as such.

But before the Court can recharacterize the motion as a petition under § 2254, it must first provide petitioner both notice of its intent to recharacterize the motion and an opportunity to withdraw it rather than having it so recharacterized. See *Adams v. United States*, 155 F.3d 582, 584 (2d Cir.1998) (*per curiam*). This is because the recharacterization of the motion to reopen as a petition for habeas corpus has real and potentially adverse consequences for the petitioner. A petition filed under § 2254 is subject to the "second" or "successive" petition restrictions of 28 U.S.C. § 2244(b) and such restrictions "might preclude [petitioner] from ever seeking federal review of claims, even meritorious ones, not raised in the petition." *Cook*, 321 F.3d at 281-82. Because a prisoner cannot bring a "second or successive" petition under § 2254 except under narrow

circumstances, see 28 U.S.C. § 2244(b), if petitioner's motion herein is properly converted to a section 2254 petition, he might be precluded from later seeking federal review of claims, even meritorious ones, not raised currently in the instant motion, which, as noted, raises only a double jeopardy claim.⁶

The Second Circuit in *Adams* determined that before a mislabeled petition can be properly recharacterized to one under § 2255, the district court must provide petitioner notice of its intent to recharacterize the petition, thereby subjecting it to the second and successive rule of § 2244(b), and provide the petitioner an opportunity to withdraw it. This notice of recharacterization rule applies in the context of any conversion of a motion or petition made under some other rule as a motion made pursuant to 28 U.S.C. § 2254. See, e.g., *Cook*, 321 F.3d at 281-82 (applying *Adams* to the conversion of a § 2241 petition to a § 2254 petition because a § 2254 petition, like a § 2255 petition, is subject to the second and successive rule--gate-keeping mechanism--of § 2244 (b)); *Newton v. Abus-Salaam*, 08-CV-1147 (DGT), 2008 U.S. Dist. LEXIS 31776, at *4 (E.D.N.Y. Apr. 17, 2008) (“[T]he Court of Appeals for the Second Circuit has stated that district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2254 unless the petitioner receives notice and an opportunity to withdraw.”); *Dennis*, 2010 U.S. Dist. LEXIS 24376 (providing petitioner who filed a “mislabeled motion” 30 days

⁶The Court notes that petitioner's papers allude to his apparent appeal of his 2010 conviction in the courts of New York. See Motion to Reopen [Docket No. 77], ¶38; Memorandum in Support of Motion [Docket No. 78], p. 33.

to either advise the Court that he wishes to have the motion treated as a § 2254 petition or to withdraw it).⁷

Accordingly, the Court is hereby notifying and advising petitioner that it intends to recharacterize the instant motion to reopen as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with respect to his 2010 state court convictions and that this recharacterization means that any subsequent § 2254 petition will be subject to the restrictions on "second" or "successive" petitions set forth in 28 U.S.C. § 2244 (b).⁸ If the complaint is recharacterized as a petition under § 2254 it will also be subject to the one year period of limitations set forth in § 2254 (d) (1).

The recharacterization or conversion of the instant motion to a petition under § 2254 will occur unless Drake notifies the Court in writing, by the date directed below, that he either (1) consents to the recharacterization or (2) voluntarily withdraws the motion instead of having it recharacterized as a petition for a writ of habeas corpus pursuant to § 2254.

CONCLUSION

For the reasons explained above, this Court lacks jurisdiction to grant petitioner's motion, made pursuant to Rule 60(b)(6), to reopen and amend the March 4, 2009 judgment in this matter, and it is accordingly denied. However, as further explained above, the Court

⁷Petitioner's papers indicate his familiarity with the restrictions on "second or successive" petitions. He asserts that "it would be unjust and inappropriate to recharacterize [the instant] motion as a 'first' habeas petition against the judgment to be imposed from the March 23, 2010 convictions." (Motion to Reopen, ¶ 38).

⁸If petitioner's motion is recharacterized as a habeas corpus petition pursuant to 28 U.S.C. § 2254, it would appear that the sole claim asserted in the petition, that petitioner's retrial violated the double jeopardy clause, has, as petitioner maintains, been exhausted (see Motion for Relief, ¶ 30; Memorandum in Support of Motion for Relief, p. 32) inasmuch as petitioner's application for a writ of prohibition to bar his retrial on double jeopardy grounds was denied by the Appellate Division, and petitioner's application for leave to appeal was thereafter denied by the New York Court of Appeals.

notifies petitioner that it will instead recharacterize his motion to reopen as a new petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and petitioner is directed to advise the Court in writing by **May 2, 2011**, of either his consent to the recharacterization or his withdrawal of the motion. If petitioner does not so advise the Court in writing by **May 2, 2011**, the Court will recharacterize the motion to reopen as a petition under § 2254.

SO ORDERED.

Dated: March 30, 2011
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

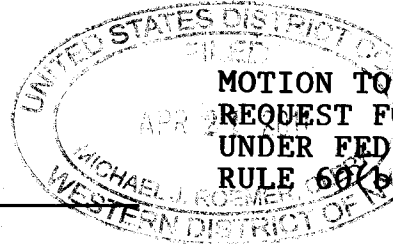
Petitioner,

-v-

L.A. PORTUONDO,

Respondent.

Docket No. 99-CV-681(S)



MOTION TO WITHDRAW
REQUEST FOR RELIEF
UNDER FED.R.CIV.P.
RULE 60(b)(6).

COMES NOW the petitioner, Robie J. Drake, appearing pro se, and moves this Court for permission to Withdraw his previously filed Motion for Relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and for such other and further relief as the Court may deem just and proper.

This motion is based upon the affidavit of the petitioner attached hereto, and upon all previous pleadings and proceedings had herein.

Dated: April 12, 2011,
Dannemora, New York.

Respectfully submitted,

Robie J. Drake,
petitioner, pro se
P.O. Box 2001
Dannemora, New York 12929

To: Hon. Michael J. Roemer,
Clerk of the Court

Thomas H. Brandt, Esq.,
attorney for respondent

5. Petitioner's Rule 60(b)(6) motion sought to have the Court reopen and amend the judgment entered in this action on March 4, 2009, to grant the writ of habeas corpus unconditionally, and discharge petitioner from further custody on the ground that any retrial was barred by the Double Jeopardy Clause of the Fifth Amendment, as the trial prosecutor deliberately engaged in egregious misconduct to fend off an anticipated acquittal (see, Docket No. 77 at ¶ 29).

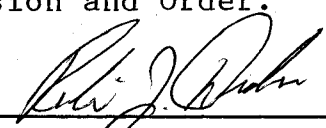
6. By Decision and Order filed March 30, 2011, this Court (Hon. William M. Skretny, Chief Judge) indicated that, for the reasons stated in said Decision and Order (pp 10-16), it no longer has jurisdiction over this matter, and would recharacterize petitioner's Rule 60(b)(6) motion as a new petition for habeas corpus under 28 U.S.C. § 2254, unless petitioner notified the Court in writing by May 2, 2011, that he voluntarily would withdraw the Rule 60(b)(6) request for relief.

7. As the Court has recognized, recharacterizing the motion as a petition for a writ of habeas corpus "has real and potentially adverse consequences for the petitioner." (Decision and Order at p. 13).


8. Accordingly, petitioner now asks the Court to permit him to voluntarily withdraw the motion for relief under Rule 60(b)(6) (Docket No. 77).

WHEREFORE, petitioner Robie J. Drake prays that this Court grant him permission to withdraw the Rule 60(b)(6) motion, as provided by the Court's Decision and Order.

Sworn to before me this
14 day of April, 2011.


Robie J. Drake

Notary Public


PATRICK SUMMO
NOTARY PUBLIC, STATE OF NEW YORK
NO: 01SU6215086
QUALIFIED IN ESSEX COUNTY
COMMISSION EXPIRES 12/21/13

-V-

Respondent.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBIE J. DRAKE,

Petitioner,

-v-

L.A. PORTUONDO,

Respondent.

Docket No. 99-CV-681(S)

AFFIDAVIT OF FILING

STATE OF NEW YORK)
COUNTY OF CLINTON) ss.:

ROBIE J. DRAKE, being first duly sworn, deposes and says:


That on this 14 day of April, 2011, I filed the original papers of the proceeding within, together with one true copy, to wit: petitioner's MOTION TO WITHDRAW REQUEST FOR RELIEF, Supporting Affidavit, and Affidavit of Service, with:

HON. MICHAEL J. ROEMER, CLERK
United States District Court
Western District of New York
United States Courthouse
68 Court Street
Buffalo, New York 14202-3406

by placing the aforesaid papers in an envelope, properly addressed to the person, above-named, and by placing same in a U.S. Mail depository at Clinton Correctional Facility, in the County of Clinton, State of New York, to be delivered via Certified Mail, Return Receipt Service, with sufficient legal postage therefore.


Robie J. Drake

Sworn to before me this
14 day of April, 2011.


Notary Public
PATRICK SUMMO
NOTARY PUBLIC, STATE OF NEW YORK
NO: 01SU6215086
QUALIFIED IN ESSEX COUNTY
COMMISSION EXPIRES 12/21/13